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## The "Horizontal Effect" of Constitutional Rights

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# THE “HORIZONTAL EFFECT” OF CONSTITUTIONAL RIGHTS

*Stephen Gardbaum\**

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## INTRODUCTION

Among the most fundamental issues in constitutional law is the scope of application of individual rights provisions and, in particular, their reach into the private sphere. This issue is also currently one of the most important and hotly debated in comparative constitutional law, where it is known under the rubric of “vertical” and “horizontal effect.” These alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal). In recent years, the horizontal position has been adopted to varying degrees, and after systematic scholarly and judicial debate, in Ireland, Canada, Germany, South Africa, and the European Union, among others.<sup>1</sup> The issue has also been the topic of sustained debate in the United Kingdom following enactment of the Human Rights Act of 1998,<sup>2</sup> for it remains an open and arguable question whether, and to what extent, the rights it protects will have horizontal as well as vertical effect.<sup>3</sup>

In the United States, by contrast, this fundamental issue has long been deemed fully and definitively resolved by a constitutional axiom: the state action doctrine. With the exception of the Thirteenth Amendment,<sup>4</sup> both the text and authoritative precedent<sup>5</sup> make clear that with respect to its individual rights provisions, the Constitution binds only governmental actors and not private individuals. End of story.

In fact, this is far from the end of the story. For several of the countries that have accepted some form of horizontal effect of individual rights provisions also accept that such rights impose constitutional duties only on governmental and not on private actors. But how is this possible? Doesn't this statement express a contradiction? The answer is no, and it is a significant cost of the state action shibboleth that it has prevented this answer from being systematically and self-consciously appreciated in the United States, as it has elsewhere. The fact that private actors are not bound by

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1. See *infra* Part I (discussing the position in these countries).

2. For general discussion and analysis of the Human Rights Act, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 732-39 (2001).

3. See *infra* notes 86-95 and accompanying text.

4. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

5. The textual provision underlying the state action doctrine is the “no state shall. . .” language of the Fourteenth Amendment’s second clause. The standard precedent cited for definitively interpreting this language as imposing constitutional duties only on governmental and not private actors is the *Civil Rights Cases*, 109 U.S. 3 (1883).

constitutional rights in no way entails that such rights do not govern their legal relations with one another,<sup>6</sup> and thereby impact what they can lawfully be authorized to do and which of their interests, choices, and actions may be protected by law. Although to be sure, the state action doctrine forecloses the most direct way in which a constitution might regulate private actors — by imposing constitutional duties on them — it does not rule out other, indirect ways. To take two famous examples: L.B. Sullivan, the losing plaintiff in *New York Times v. Sullivan*,<sup>7</sup> certainly was adversely affected by the First Amendment that was deemed to govern his legal relations with the newspaper, even though suing in his private capacity, Sullivan was not bound by its provisions. Similarly, although the private actors seeking to enforce their racially restrictive covenants in *Shelley v. Kraemer*<sup>8</sup> were not bound by the Equal Protection Clause, this did not prevent the Clause from substantially affecting them.

Accordingly, the state action doctrine gives only a partial answer to the foundational question of the reach of constitutional rights into the private sphere in the United States, and in this Article I attempt to provide the complete one. The full answer, however, can only be appreciated when viewed through a comparative lens because this supplies the necessary perspective and analytical framework for identifying the true distinctiveness of the U.S. position. Ironically, this distinctiveness that comparative materials enable us to see turns out to be almost exactly the opposite of what it is standardly understood to be within the discipline of comparative constitutional law itself. For, taking the conventional American answer provided by the state action doctrine at face value, comparativists almost universally view the United States as the paradigm of the polar, strictly “vertical” approach to constitutional rights on the spectrum of possible positions.<sup>9</sup> By explaining why the U.S. position is in fact far more horizontal than supposed, I hope also to sharpen and revise the existing spectrum of positions for the entire topic. In this way, the Article seeks to make a contribution to both domestic and comparative constitutional law.

In order to provide the full U.S. position on the scope of constitutional rights and their impact on private actors, it is necessary

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6. See Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 210 (1957) (“[T]here is no inconsistency between the ‘private’-‘state’ action distinction of the *Civil Rights Cases* and the often-applied principle that the Fourteenth Amendment imposes limits on the way in which a state can balance legal relations between private persons.”).

7. 376 U.S. 254 (1964).

8. 334 U.S. 1 (1948).

9. See, e.g., Murray Hunt, *The “Horizontal Effect” of the Human Rights Act*, 1998 PUBLIC LAW 423, 427 (“The jurisdiction which is closest to the position favoured by the verticalists is the United States.”). See *infra* Part I (discussing the existing spectrum) and Part III (discussing my revisions to it).

to bypass the notorious labyrinth of state action jurisprudence altogether and instead focus directly on the following set of fundamental threshold questions that other constitutional systems have self-consciously addressed: (1) Do constitutional rights apply to the actions of courts, or only to the legislative and executive branches of government? (2) Is private law subject to the Constitution, or only public law? (3) Is common law subject to the Constitution, or only enacted law? (4) Does the Constitution apply to litigation between private individuals, or only to litigation between a private individual and the state?<sup>10</sup> Even absent private actors being bound by the Constitution, different answers to these four questions result in differing degrees to which private conduct is indirectly subject to constitutional norms.

Although these are somewhat unfamiliar constitutional questions in the United States due to the axiomatic and preemptive status of the state action doctrine, their individual answers are for the most part not controversial and collectively they provide a resolution of the general issue that is quite clear and uncomplicated. All law, including common law and the law at issue in litigation between private individuals, is directly and fully subject to the Constitution. The exclusive focus on the Fourteenth Amendment's state action requirement as the source for determining the scope of constitutional rights has obscured this more basic and fundamental proposition,<sup>11</sup> which I will argue derives

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10. A fifth question is also generally relevant in determining the total indirect impact of constitutional rights on private actors, but less so in the United States: Do the constitutional duties placed on government include positive ones to prohibit or penalize certain actions by private individuals that touch on constitutional values? This question is less relevant in the United States because, as is well-known, it is generally answered negatively. *But cf.* Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (arguing that the Equal Protection Clause of the Fourteenth Amendment imposes affirmative duties to prevent private racial discrimination in certain areas of vital interest, such as voting and urban housing).

By contrast, in Germany (where they are known as "protective duties") and elsewhere, the existence of several important positive duties on the state to promote constitutional values makes this an important part of the total horizontal effect of constitutional rights. For if the state is constitutionally required to promote certain constitutional values (for example, equality between the sexes), its resulting regulation may well cover private actors. For a discussion of the role that commitment to social democratic norms in general, and such positive governmental duties in particular, play in the issue of horizontal effect, see Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 88-92 (2003). For further discussion of the role that the absence of positive duties plays in the United States, see *infra* Part III.

11. This premise — that the answer to the general issue of the scope of constitutional rights is provided by the state action requirement of the Fourteenth Amendment — is fully shared by those few commentators who have argued for a broad interpretation of "state action" to include laws regulating relations among private actors. See Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993) (reasoning that state action is ubiquitous because exercises of private power take place against a background of laws); Horowitz, *supra* note 6; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (arguing that a state acts for Fourteenth Amendment purposes when it enforces "natural" and "neutral" common law baseline of existing

not from the Fourteenth Amendment at all but is a straightforward implication of the Supremacy Clause.<sup>12</sup>

Moreover, since this clause renders all law fully, directly, and equally subject to the Constitution — including contract, property, employment, trespass, and testamentary law — there should be no separate threshold issue of state action, as currently exists, to be resolved on a case-by-case basis whenever the constitutionality of a law invoked in litigation between private actors is challenged.<sup>13</sup> The only genuine issue is the substantive one of whether that law violates the Constitution. This analysis straightforwardly and parsimoniously disposes of the controversial state action issue in cases such as *Shelley*.<sup>14</sup> It also explains why it is absurd to distinguish among laws as to the kind or degree of state action involved, as the Court now does, so that some laws are subject to constitutional scrutiny and others are seemingly immune.<sup>15</sup>

This full answer does not render private actors bound by the Constitution but it does mean that individual rights provisions have a significant impact on them. By governing their legal relations with each other, such rights limit what private actors can lawfully be empowered to do and which of their interests, preferences, and actions can be protected by law. This indirect effect of constitutional rights on private actors is actually quite radical by comparative constitutional standards, placing the United States far closer to the horizontal end of the spectrum than the vertical. In this important structural respect, the scope of individual rights provisions is greater than, for example, in Canada and no less than in Germany, two countries standardly viewed as taking a more horizontal approach than the “purely vertical” United States.<sup>16</sup>

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distributions). For my further discussion of Sunstein, see *infra* notes 118-124 and accompanying text.

12. U.S. CONST. art. VI (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). For my argument, see *infra* Part II.B.

13. There are, however, some procedural limits on such a challenge, as I explain *infra* notes 136-139 and accompanying text.

14. As I will show in Part II.D.

15. In *Flagg Brothers, Inc. v. Brooks*, the Court’s opinion that the plaintiff’s claim failed the threshold state action requirement strongly suggested a categorical immunity from constitutional scrutiny for all laws, including state statutes and even state constitutional provisions, that are merely permissive of private conduct. 436 U.S. 149, 164 (1978) (“Our cases state ‘that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.’ This Court has never held that a State’s mere acquiescence in a private action converts that action to that of the State.” (citations omitted)).

16. On Canada, Hunt, for example, places the United States in the “vertical” position and Canada in the more horizontal position of “indirect horizontal effect.” See Hunt, *supra* note 9. On Germany, see, e.g., EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 29 (2002). (“The [German] Basic Law’s influence on civil law is a notable contrast to American law. . . . [I]n

To say that all laws regulating relations between private actors are subject to the Constitution is not, of course, to say which laws of this sort violate it. This, the only genuine constitutional issue in every case, is a matter of substantive constitutional law. I will consider this substantive issue in the context of assessing the constitutionality of two paradigmatic categories of laws regulating private relations: laws touching on private race and sex discrimination, and laws regulating speech between individuals. By explaining which types of actual and hypothetical laws potentially relied on by private employers, speech-penalizers, racists, and sexists are and are not constitutional under current doctrine, I will be demonstrating when such private actors are effectively regulated by the constitutional rights of others.

In exploring this issue in the American context, I also look at comparative treatments of similar laws in Germany and Canada. This comparison will suggest whether the structural issue of the general reach of constitutional rights or the substantive one of their content appears to play a larger role in terms of the actual impact of the rights on private actors. Finally, in support of the proposition that both matter, I demonstrate how, given the substantial indirect effect of constitutional rights on private actors, a much debated change in the interpretation of the Equal Protection Clause would have less debated, but far-reaching, implications.

The Article proceeds in the following way. In Part I, I introduce the existing theoretical spectrum of positions on the vertical and horizontal effect of individual rights provisions in comparative constitutional law and illustrate its practical application in Ireland, Canada, South Africa, Germany, and the United Kingdom. This provides the essential set of analytical tools for transcending the state action axiom in the United States and for illuminating the broader, underlying issues and options it has operated to conceal. In Part II, I utilize these tools to present the full American answer on the scope of constitutional rights, an answer that defies comparative conventional

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comparison to the Basic Law's "objective" ordering of society, the American Constitution withdraws from the important private sector of society. . . . In this way, the reach of the German Basic Law is broader than its American counterpart."); Basil Markesinis, *Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q.R. 47 (1999) at 82: ("[Compared to the United States], German law has a more over-arching effect that touches private law in a wider but, as already stated, balanced manner.").

My comparative constitutional claim in this Article is limited to the structural issue of the reach of constitutional rights into the private sphere and the extent to which they govern all other legal norms. I do not make a substantive claim that in practice, constitutional rights have more or less total impact on private actors in the United States than elsewhere. This latter issue turns on a host of additional factors, including the substantive rights granted, their interpretation, and the existence of positive duties placed on government. Although I consider the substantive impact on private actors of certain specific constitutional rights in Part III, it is beyond the scope of this Article to make the global claim that overall one constitution or another has greater total impact on private conduct than another.

wisdom and deepens our understanding of domestic principles, practices, and possibilities. In Part III, I propose a revised and clarified spectrum of positions on vertical and horizontal effect that incorporates my analysis of the United States and alters several of the options on the existing menu. In Part IV, I turn from the now resolved structural issue of the general scope of constitutional rights to the actual impact of specific ones on private actors. Here I consider the substantive issue of which laws regulating relations between private actors violate constitutional rights in the areas of free speech and equal protection.

#### I. VERTICAL AND HORIZONTAL EFFECT OF INDIVIDUAL RIGHTS: THE SPECTRUM OF POSITIONS IN COMPARATIVE CONSTITUTIONAL LAW

The issue of the scope of application of constitutional rights and the extent to which they either are, or should be, binding in the private sphere has in recent years been, and remains, a central and extremely important one in comparative constitutional law. Within the last twenty years, the issue has been confronted, debated, and resolved in Canada under the 1982 Charter of Rights and Freedoms, in South Africa first under its Interim Constitution of 1993 and then the Final Constitution of 1996, and in Hong Kong under its Bill of Rights Ordinance of 1991.<sup>17</sup> In Germany, the Constitutional Court gave its definitive answer in the late 1950s to what had been an open and controversial question during its first few years of existence,<sup>18</sup> and the European Court of Justice did likewise for the European Union during the 1970s.<sup>19</sup> In the new, post-communist constitutions of central and eastern Europe, although the issue of vertical or horizontal effect has been far less prominent than that of placing positive duties on government to promote social and economic rights, it has nonetheless been raised.<sup>20</sup> In the United Kingdom, the issue is still very much a live

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17. On Canada, see *infra* notes 44-55 and accompanying text; on South Africa, see *infra* notes 56-60 and accompanying text. On Hong Kong, see Hunt, *supra* note 9, at 427-28.

18. See *infra* notes 64-85 and accompanying text.

19. In the European Union, the two seminal cases were Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405 (holding that Article 7 of the Treaty of Rome, which prohibits discrimination on the grounds of nationality, applies to the defendant private organization) and Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455 (holding that the principle of "equal pay for male and female workers for equal work," contained in Article 119 of the Treaty, applies to private employers). See *infra* notes 41-43 and accompanying text.

20. Cass Sunstein reports that "post-communist constitutions pervasively fail to make this distinction [between the constitutional duties of government and constitutional duties within the private sphere], and instead impose their duties on everyone, and create rights which are good against everyone. This step perpetuates, if in a small way, the failure of communist societies to create and protect a civil sphere." Cass R. Sunstein, *Against Positive*



one following enactment of the Human Rights Act of 1998, the text of which is ambiguous on the issue.<sup>21</sup> Meanwhile, a growing body of theoretical literature has become available to assist the practical resolution of the issue in these and other countries.<sup>22</sup>

### A. *The Two Poles*

Both the theoretical debate and its real world resolution in various jurisdictions posit a spectrum of two polar positions with at least one, and possibly two, intermediate options.<sup>23</sup> The first polar position is that of a purely vertical approach to the issue. This is the familiar position that individual rights bind — impose constitutional duties on — only the government and not private actors. Rights regulate only the conduct of governmental actors in their dealings with private citizens but not relations among private citizens. This contrasts straightforwardly with a situation in which private individuals have constitutional duties, such as the single instance under the U.S. Constitution: the duty not to engage in slavery or involuntary servitude under the Thirteenth Amendment.<sup>24</sup>

The animating idea informing the vertical approach is the perceived desirability of a public-private division in the scope of constitutional rights, leaving the private sphere free from constitutional regulation. The well-known justifications for this division lie in the values of liberty, autonomy, and privacy. A constitution's most critical and distinctive function is to provide law for the lawmaker, not for the citizen, thereby filling what would otherwise be a serious gap in the rule of law.<sup>25</sup> Further, limiting the scope of constitutional rights to the public sphere enhances the autonomy of citizens, preserving a heterogeneous private sphere free

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*Rights, in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225, 228 (Andras Sajó ed., 1996).

21. See *infra* notes 87-94 and accompanying text.

22. See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993); Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993); Andrew Clapham, *The Privatisation of Human Rights*, 1 EUR. HUM. RTS. L. REV. 20 (1996). An even more recent round of contributions to the literature has arisen in the context of the uncertainty surrounding the horizontal effect of the UK's Human Rights Act. See, e.g., Hunt, *supra* note 9 and the articles cited in *infra* note 88.

23. Hunt's account of the spectrum of positions, see Hunt, *supra* note 9, has been influential in Britain in framing the debate about the scope of the Human Rights Act. In what follows, I make general use of his account as a starting point for my own exposition and analysis.

24. See *supra* note 4.

25. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 342-46, 351-53 (1993).

from the uniform and compulsory regime constructed by constitutional norms.<sup>26</sup>

The opposite polar position is that of the horizontal approach to the issue. Constitutional rights provisions impose constitutional duties on private actors as well as on government, thereby regulating interpersonal relations, and private actors may sue each other for violations of these duties. The horizontal position expressly rejects a public-private division in constitutional law, and its justifications reflect a well-known critique of the "liberal" vertical position. At least in the modern context, constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as governmental ones,<sup>27</sup> and the vertical position automatically privileges the autonomy and privacy of such citizen-threateners over that of their victims.<sup>28</sup> Thus, the autonomy of racists, sexists, and harmful speakers is categorically preferred to that of those harmed or excluded by their actions, without any obvious justification in terms of an overall assessment of net gains and losses in autonomy. Moreover, since the vertical position does not prevent private actors from being regulated by statute or common law, it is unclear why autonomy is especially or distinctively threatened by constitutional regulation.

Within the emerging model for discussing the issue in comparative constitutional law, the two countries generally understood to come closest in practice to the opposite poles of the theoretical spectrum are the United States for the vertical position and Ireland for the horizontal. According to Murray Hunt:

The jurisdiction which is closest to the position favoured by the verticalists is the United States. As is well-known, U.S. constitutional law requires there to be "state action" in order for the constitutional protections in the Bill of Rights to apply. The text of the Constitution itself makes clear that those protections apply only to the activities of either the state or federal governments, and where a constitutional right is relied on in litigation between private parties the Supreme Court has made clear that courts must determine whether the activities of the

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26. In the United States and other federal systems, there is an additional standard argument for limiting the scope of constitutional rights to the government: the constituent political units should be able to determine through their own constitutions or laws what rights individuals have against fellow citizens.

27. This critique has been used as the basis for the argument that the First Amendment should be understood as a sword to be used by government and not merely a shield against it, so that regulation of private speakers to promote the interests of citizen-hearers in having access to a broad and rich debate on public issues should be constitutionally permitted. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). More generally, the critique has been the basis for an argument that the state action limitation on the scope of constitutional rights should simply be abolished. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

28. See, e.g., Chemerinsky, *supra* note 27, at 536-41.

private party alleged to have infringed the protected right are sufficiently connected to the government to constitute state action to which the Constitution applies.<sup>29</sup>

At the opposite end of the spectrum lies Ireland, whose Supreme Court has interpreted certain of the rights provisions in its Constitution to have horizontal effect; that is, rights directly bind private individuals and not only the state.<sup>30</sup> The mechanism for this has been the court's development of the constitutional tort action, which lies for breaches of constitutional rights by private individuals. As Justice Walsh said in the 1973 case of *Meskeil v. Coras Iompair Eireann*, "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right."<sup>31</sup> And Justice Costello: "Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials."<sup>32</sup>

In essence, the Irish Supreme Court has interpreted provisions of the Irish Constitution such as the one declaring that "[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen"<sup>33</sup> to impose a positive obligation on all state actors, including the courts, to protect and enforce the rights of individuals. And this in turn has been taken to require the courts to permit an individual to invoke the constitution directly as a source of a claim against another individual.<sup>34</sup> Examples of particular constitutional rights that have been given full horizontal effect include the freedom of association (violated, for example, by the "closed shop" practice of trade unions<sup>35</sup>), the freedom from sex

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29. Hunt, *supra* note 9, at 427.

30. See generally the extensive discussion of the Irish position and case law in Butler, *supra* note 22.

31. [1973] I.R. 121, 133.

32. *Hosford v. John Murphy & Sons*, [1987] I.R. 621, 626.

33. IR. CONST. Art 40.3.1 (1937).

34. See Butler, *supra* note 22.

35. See, e.g., *Meskeil*, [1973] I.R. 121 (holding that a trade union violated an individual's freedom of association by enforcing a closed shop agreement on existing employees).

discrimination,<sup>36</sup> the right to earn a livelihood,<sup>37</sup> and the right to due process.<sup>38</sup>

Horizontal effect has also been given to certain rights in South Africa under its Final Constitution of 1996. Section 8(2) of its Bill of Rights declares: "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."<sup>39</sup> In addition, Section 9(4) imposes a duty on private individuals not to discriminate against others on the same comprehensive set of grounds that applies to the state.<sup>40</sup> Finally, the European Court of Justice has held that at least two of the individual rights contained in the Treaty of Rome, the "constitution" of the European Community,<sup>41</sup> bind private actors as well as governmental ones. These are equal pay for men and women at work, and nondiscrimination on the grounds of nationality.<sup>42</sup> Moreover, under the doctrine of "direct effect," national courts are obligated to protect these rights by, among other things,

36. See, e.g., *Murtagh Props., Ltd. v. Cleary*, [1972] I.R. 330 (Ir. H. Ct.) (ordering an injunction against a trade union for violating an individual's constitutional right to equality by objecting to the employment of women by plaintiff publican).

37. See *Lovett v. Gogan*, [1995] 1 I.L.R.M. 12; *Parsons v. Kavanagh*, [1990] 10 I.L.R.M. 560 (Ir. H. Ct.) (granting an injunction against a defendant unlicensed transport company found to be interfering with the plaintiff licensed transport company's constitutional right to earn a livelihood). This is also discussed in Hunt, *supra* note 9, at 428.

38. See *Glover v. B.L.N., Ltd.*, [1973] 1 I.R. 388 (Ir. H. Ct.) (awarding damages to a plaintiff for violation by defendant employer of constitutional right to fair procedures implied into employment contract permitting dismissal for just cause).

39. S. AFR. CONST. ch. 2 (Bill of Rights), § 8(2).

40. *Id.* ch. 2, § 9(4) ("No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).").

Subsection (3) states as follows: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." *Id.* ch. 2, § 9(3).

41. The Treaty Establishing the European Community, originally signed in Rome in 1957 by the six founding members, is the constitutive document of the European Community, which maintains its legal distinctiveness from the broader European Union, created by the 1992 Treaty on European Union. As a result of the European Court of Justice's landmark decisions on the supremacy and direct effect (within national legal systems) of European Community law in the 1960s, the Treaty has taken on many of the characteristic features of a domestic federal constitution. For an influential account and analysis of these developments, see Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 403 (1991).

42. "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied." TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 141(1), O.J. (C 340) 3 (1997) [hereinafter EC Treaty]. Horizontal effect was established in the case of *Defrenne v. Sabena*, discussed *supra* note 19.

"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." EC Treaty, *supra*, art. 12. Horizontal effect was established in *Walrave v. Association Union Cycliste Internationale*, *supra* note 19.

guaranteeing effective causes of action and remedies if they do not already exist.<sup>43</sup>

### B. *Indirect Horizontal Effect*

Between these polar positions of vertical and horizontal effect of constitutional rights lies a third position that has come to be known as "indirect horizontal effect." In essence, this intermediate or hybrid position is that although constitutional rights apply directly only to the government, they are nonetheless permitted to have some degree of indirect application to private actors. To get a better sense of both how this position has been articulated and what it means in concrete terms, let us look at the two countries generally understood to employ the position in practice: Canada and Germany.

The Canadian Supreme Court is widely acknowledged to have adopted indirect horizontal effect as its general position on the scope of the 1982 Charter of Fundamental Rights and Freedoms.<sup>44</sup> Drawing a distinction between constitutional "rights" and constitutional "values," it adheres to the vertical position requiring "governmental action" before constitutional *rights* are triggered, but permits them to have some horizontal application to private individuals even absent such action through the inherent power of the courts to develop the common law in line with the constitutional *values* contained in the Charter. It will be a useful exercise to follow the court through the various stages of its reasoning.

In the well-known 1986 case of *Dolphin Delivery*,<sup>45</sup> a private company sought and obtained an injunction under the common law of inducing breach of contract to restrain the secondary picketing of its premises by a trade union. The union argued that the picketing was protected speech under the Charter's guarantee of freedom of expression. The Supreme Court held that although secondary picketing was indeed within the Charter right, the Charter did not apply to the common law litigation in which the injunction was granted. This conclusion followed from the court's interpretation of

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43. The doctrine of "direct effect," first established in the landmark case of Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, holds that under certain circumstances provisions of EU law create rights for individuals that must be protected within their national legal systems by national courts. This includes the provision by these courts of effective and adequate remedies. See, e.g. Case C-271/91, *Marshall v. Southampton and South-West Hampshire Health Authority*, 1993 E.C.R. I-4367, [1993] 3 C.M.L.R. 293 (1993); Case 14/83, *Von Colson und Kamann v. Land Nordrhein Westfalen*, 1984 E.C.R. 1891.

44. See generally Butler, *supra* note 22 (describing the development of indirect horizontal effect in Canada); Hunt, *supra* note 9 (same).

45. *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

the two relevant provisions of the Charter: the "Supremacy Clause" of Section 52(1) and the application clause of Section 32(1).

Section 52(1) of the Charter provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."<sup>46</sup> On the basis of this language, the court stated "there can be no doubt" that the Charter applies to the common law.<sup>47</sup> On the other hand, the court reasoned, the separate question of whether the Charter applies to private litigation was equally clearly answered by Section 32(1), which states as follows:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament. . . ; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.<sup>48</sup>

The court interpreted "government" according to standard usage to mean the executive branch only, with the consequence that the Charter applies neither to private actors nor the courts. Therefore, the Charter applies to the common law only when it is the basis of some legislative or executive action, such as prosecution reliance on a common law evidentiary rule. In particular, the Charter does not apply to common law litigation between private parties where the only official action is a court order.<sup>49</sup>

At the same time, the opinion for the court was careful to state that this conclusion did not mean the Charter was entirely irrelevant to such private litigation:

Where . . . private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the

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46. CAN. CONST. (Constitution Act, 1982) pt. VII, § 52(1).

47. *Dolphin Delivery*, [1986] 2 S.C.R. at 592.

48. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 32(1).

49. *Dolphin Delivery*, [1986] 2 S.C.R. at 603. By contrast, the Charter applies, according to the court, in private litigation relying on a statute rather than the common law. It gave the example of *Re Blainey and Ontario Hockey Ass'n*, [1986] 26 D.L.R. (4th) 728, in which a twelve-year-old girl successfully sued a private hockey association that excluded her from playing on a boys' team on the basis that Section 19(2) of the Ontario Human Rights Code relied on by the defendant violated the Charter's sex discrimination provisions.

proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.<sup>50</sup>

In this way, *Charter* rights impose duties only on government, whereas *Charter* values influence the entire legal system.

In the subsequent case of *Hill v. Church of Scientology of Toronto*,<sup>51</sup> the Supreme Court further elaborated on the differences between *Charter* rights and values. Where a party alleges that legislative or executive action violates the *Charter*, a cause of action has its source in that *Charter* right. In the context of a legal dispute between private parties, however, in which the consistency of the common law with *Charter* values becomes relevant, the *Charter* creates no new cause of action because private parties owe each other no constitutional duties. The parties must rely on existing common law causes of action and courts must “not . . . expand the application of the *Charter* beyond that established by Section 32(1) . . . by creating new causes of action.”<sup>52</sup> Moreover, courts must take a cautious approach to amending the common law; “[f]ar-reaching changes . . . must be left to the legislature.”<sup>53</sup> Finally, unlike the case of a *Charter* challenge to governmental action, where the onus is on the government to justify its actions once a *prima facie* violation of a right is proven, “[i]t is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.”<sup>54</sup> In short, it is no easy task to prevail on a “*Charter* value” challenge to the common law in the context of private litigation.<sup>55</sup>

A virtually identical result to the Canadian was achieved under South Africa’s Interim Constitution of 1993. In *Du Plessis v. De Klerk*,<sup>56</sup> a defamation action between a company and a newspaper, a majority of the South African Constitutional Court held that although the Constitution’s Bill of Rights neither had “general direct horizontal application” nor applied in private litigation based on the common law, it nevertheless may, and should, have an influence on the development of the common law governing relations between

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50. *Dolphin Delivery*, [1986] 2 S.C.R. at 605.

51. [1995] 2 S.C.R. 1130.

52. *Hill*, [1995] 2 S.C.R. at 1170.

53. *Id.* at 1171.

54. *Id.* at 1172.

55. Although a “*Charter* value” challenge to the common law failed in both *Dolphin Delivery* and *Hill*, it has succeeded in at least one case. See *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (holding that the common law rules of psychiatrist-patient privilege must be modified in light of *Charter* values).

56. 1996 (3) SA 850 (CC).

individuals. The relevant textual provisions contained the following application clause:

7 (1) This Chapter shall bind all legislative and executive organs of state at all levels of government; (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.<sup>57</sup>

In addition, an interpretive clause stated: "In the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."<sup>58</sup> The leading judgment of Justice Kentridge relied primarily on these textual provisions,<sup>59</sup> but also discussed extensively the Canadian and German solutions distinguishing between the direct application of constitutional rights against private actors and their indirect application to private litigation. By contrast to the Interim Constitution, South Africa's Final Constitution of 1996, as we have seen, permits direct horizontal application of rights provisions.<sup>60</sup>

Within the comparative constitutional law literature on vertical-horizontal effect, Germany is often understood to share the same position on the spectrum as Canada.<sup>61</sup> Constitutional rights have indirect horizontal effect because they influence, but do not directly govern or control, private law disputes between individuals.<sup>62</sup> In both

57. S. AFR. CONST. OF 1994 ch. 3, § 7.

58. *Id.* ch. 3, § 35(3).

59. In addition to the two parts of Section 7 being given the same interpretation as Sections 32 and 52 in Canada, the court argued that the wording of Section 33(5) would be redundant if the common law was directly subject to the bill of rights.

60. See *supra* note 39 and accompanying text. For an interesting argument that notwithstanding such direct horizontal effect in the text of the final Constitution, the South African Constitutional Court should adopt and apply U.S. state action doctrine, see Stephen Ellmann, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors*, 45 N.Y.L. SCH. L. REV. 21 (2001).

61. See Hunt, *supra* note 9, at 432, n.26:

The distinction in Canada, between the *direct* application of constitutional rights between private parties and the *indirect* influence of the underlying values and principles of the constitution on the rules of private law, also has an important parallel in Germany, in which the values underlying the rights protected by the Basic Law influence the interpretation of rules of private law, without being directly applicable.

*Id.* (citations omitted); Markesinis, *supra* note 16, at 73 ("What form our own [UK] version of horizontality will take remains to be seen; but the German model, close as I see it to the Canadian . . . must make it an obvious source of inspiration."); Gavin Phillipson, *The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?*, 62 MODERN L. REV. 824, 830 (1999) ("The . . . courts should apply and develop existing law in the light of the values represented by any applicable constitutional rights . . . . This, broadly speaking, appears to be the position adopted by the courts in Canada, South Africa and Germany." (citations omitted)).

62. See, e.g., Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT. & COMP. L. Q. 571, 599 (1968) ("[B]asic



countries, the courts have a duty to take constitutional values into account when adjudicating purely private litigation, but are not bound to ensure the full compatibility of the relevant private law with constitutional rights for the latter do not apply directly to the case. The only major difference between the two countries on this understanding is that the type of law not directly governed by constitutional rights in Canada is judge-made common law at issue in private litigation, whereas in Germany, a civil law country lacking such a source of law, it is the broader category of statutory private law, including the Civil Code.

This understanding of the constitutional position in Germany is, however, mistaken. Germany does indeed adopt indirect horizontal effect, but in a distinct way from Canada. All private law in Germany is directly subject to the constitutional rights contained in the Basic Law.<sup>63</sup> The mistake has arisen in part because of a somewhat understandable misreading of the foundational German case on the issue and in part because the entire German position on the scope of constitutional rights is quite complex and does include a judicial duty that is broadly similar to the Canadian one. But the mistake has also been the result of general confusion about the concept of indirect horizontal effect. Accordingly, in briefly explaining the reach of constitutional rights in Germany in what follows, I will also be clarifying this concept itself.

The text of the 1949 Basic Law of the Federal Republic of Germany is largely ambiguous on the issue of whether its rights provisions bind only the government or also private individuals, as they are typically expressed in declaratory and universalistic terms.<sup>64</sup>

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rights clauses affect private law relations indirectly, the values that they express being brought to bear in 'interpreting' provisions of the private law, rather than directly, as higher private law norms."'). Peter Quint writes:

[T]he producers' action [in] Lüth was an action of 'private' law and, therefore, the constitutional speech rights of Lüth — while not irrelevant to the action — were only 'indirectly' applicable in the case. In this type of private law action, as in all types of private law actions, constitutional principles 'influence' the norms of private law but do not completely supersede them.

Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 264 (1989); *id.* at 266 ("In public law, under German doctrine, the constitution is 'directly' and fully applicable. In private law, under the principles of the Lüth case, the constitution is only indirectly applicable, but it has some — albeit reduced — application nonetheless."').

63. As Greg Taylor has recently reminded us in a highly incisive article. See Greg Taylor, *The Horizontal Effect of Human Rights, the German Model and its Applicability to Common Law Jurisdictions*, 13 KING'S COLL. L.J. 187 (2002). Taylor adds that "it is, indeed, the almost unanimous view among German commentators . . . that statutory private law is subject directly to basic rights." *Id.* at 196 (citations omitted).

64. Thus, unlike the U.S. Constitution's "Congress shall pass no law . . ." and "No state shall . . ." language, the Basic Law states that "[e]veryone [has] the right to the free development of his or her personality," and that "[e]veryone [has] the right to life and to [physical integrity]." Grundgesetz [GG] [Constitution] art.2 (F.R.G.). The Basic Law also

Adding to the initial uncertainty of Germany's position on vertical and horizontal effect were two other important legal facts, which created an uneasy relationship between the Basic Law and private law. Germany, like other civil law countries, distinguishes public from private law to a far greater degree than do common law jurisdictions.<sup>65</sup> Private law is comprehensively codified in a series of subject-matter codes, and is adjudicated by separate hierarchies of specialized civil courts that are distinct from the two most important public law courts: the Federal Administrative Court and the Federal Constitutional Court [hereinafter "FCC"].

Second, the German Civil Code of 1896 had been viewed since its inception as the crowning glory of the legal system, a definitive and authoritative written document with a cultural status and prestige not dissimilar to that of the Constitution in the United States.<sup>66</sup> In the context of these two features of German legal culture, the issue of the scope of constitutional rights was considered through the lens of whether the Basic Law applies to the Civil Code and other private law at all or rather is limited to the field of public law, which regulates relations between the individual and the state.

In a series of decisions in the 1950s, first the various federal civil courts and eventually the FCC developed the doctrine that has come to be known as *Drittwirkung* (or third-party effect of constitutional rights), which has remained foundational ever since.<sup>67</sup> In essence, this doctrine holds that although constitutional rights bind only governmental organs, they apply directly to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law. Constitutional rights, declared the FCC in the landmark Lüth decision of 1958, form "an objective order of values."<sup>68</sup> It continued:

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declares that "[m]en and women shall have equal rights," GG art. 3 Nr. 2, "[f]reedom of faith [and] of conscience, and freedom of creed, religious or ideological [*weltanschaulich*], shall be inviolable," art. 4 Nr.1 GG, "[e]veryone [has] the right freely to express and disseminate his or her opinion in speech, writing, and pictures," GG art. 5 Nr. 1, and "[a]rt and science, research, and teaching, shall be free," GG art. 5 Nr. 3.

65. Like the Thirteenth Amendment in the United States, the right contained in Article 1(3) of the Basic Law to freedom of association in the employment field has been held to bind private actors. "The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all occupations," GG art. 9 Nr. 3.

66. See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 31-32 (2d ed. 1985) (describing the cultural status of the Civil Code of 1896).

67. The detailed story of this development is recounted in Lewan, *supra* note 62, at 579-91 (1968). On the continuing validity of the *Drittwirkung* theory, as formulated in Lüth, see Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law*, 6 EUR. HUM. RTS. L. REV. 421, 423 (2001); Taylor, *supra* note 63, at 199 ("no sign" of the *Drittwirkung* doctrine being abandoned by the FCC).

68. Lüth, BVerfGE 7, 198 (205). The concept of "an objective order of values" contrasts with the concept of constitutional rights as merely "subjective" or "defensive" rights of the

This value system, which centers upon human dignity and the free unfolding of personality within the social community, must be looked upon as a fundamental constitutional decision affecting the entire legal system. . . . It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>69</sup>

Accordingly, in Germany (unlike in Canada) all private law is directly subject to constitutional rights and is invalid if in conflict with them. Within comparative constitutional law, this fact has sometimes been overlooked, and the German and Canadian positions falsely equated, because of confusion about what exactly is "indirect" in the concept of indirect horizontal effect. What is indirect is the effect of constitutional rights on private actors. Unlike the direct effect of constitutional rights on private actors resulting from imposing constitutional duties on them in the fully horizontal position, indirect horizontal effect is achieved via the impact of constitutional rights on the private law that individuals invoke in civil disputes. This impact on private law can be either direct, where constitutional rights fully apply to it, or indirect, where courts are required to take constitutional values into account in interpreting and applying its provisions. Conceptually, however, it does not matter which of these two methods is adopted; it is the indirectness of the effect on private *actors*, not on private *law*, that defines the general position.<sup>70</sup> Yet, there has been a (mostly implicit) tendency in the literature to assume that indirect horizontal effect requires the indirect subjection of private law to constitutional rights in order to distinguish this position from direct horizontal effect.<sup>71</sup> And since Germany, unlike Ireland, does not endorse the latter, it follows on this reasoning that private law must only be indirectly subject to the basic rights.

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individual against the state. It also forms the basis for positive duties on the state to promote these objective values.

69. *Id.*

70. Practically, the actual impact of constitutional rights will likely be greater under the direct version. Although conceptually, indirect horizontal effect is a single position, the difference between direct and indirect application to private law creates an important sub-division. I will refer in Part IV to this sub-division as "strong" and "weak horizontal direct effect," employing the terms introduced by Phillipson, *see supra* note 61, but slightly altering their meaning.

71. *See, e.g.,* Brinktrine, *supra* note 67, at 424:

This objective order of values . . . has a so-called 'radiation effect' . . . . This means that the system of objective values created by the Basic Law permeates the entire legal system. It influences the interpretation and application of all statutes ranking lower than the Constitution. But how does this 'radiation effect' find its way into private law? *Since the private law should not be 'governed' by the basic rights (that would lead to a direct effect of basic rights)* another method has to be applied.

*Id.* (emphasis added; citations omitted).

The second cause of mischaracterizing Germany's position is more understandable. This is the FCC's language in its foundational Lüth decision of 1958. Although, as we have just seen, the FCC expressly stated that private law must not conflict with constitutional rights,<sup>72</sup> it also repeatedly referred to the "influence" of the basic rights on private law and to the "radiating effect" of the objective order of constitutional values. These terms might well be thought to suggest that the impact of basic rights on private law is exclusively indirect, something less than fully controlling or governing, creating a duty similar to that placed on Canadian courts in interpreting and developing the common law.<sup>73</sup>

A full understanding of the court's decision, however, belies this suggestion. In Lüth, the FCC overturned on free speech grounds an injunction granted by a regional court under Section 826 of the Civil Code to Veit Harlan, a Nazi-era film director, against the boycott of his new film organized by Eric Lüth, a press official in the City of Hamburg acting in his private capacity.<sup>74</sup> Section 826 states that "[a] person who wilfully causes damage to another in a manner contrary to good morals is bound to compensate the other for the damage." Here, the FCC's language about the "influence" and "radiating effect" of constitutional values must be read in the context of its explicit statement that it was not deciding the whole *Drittwirkung* issue but only that part of it necessary to decide the case.<sup>75</sup> For the court found it entirely unnecessary to determine the constitutional validity of Section 826. Rather, it held that the lower court committed constitutional error by failing to interpret and apply the open-ended Section 826 in light of the "influence" and "radiating effect" of the constitutional value of free speech. It was required to take this and other constitutional values into account in determining what conduct amounts to acting contrary to "good morals."<sup>76</sup>

In other words, the FCC imposed a "prophylactic" duty on the civil courts to interpret and apply provisions of private law in a manner

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72. See *supra* note 69 and accompanying text.

73. See *supra* notes 61-63.

74. Lüth, *supra* note 68.

75. *Id.* at 204 ("Nor is there any need here to resolve fully the dispute over the so-called effect of the basic rights on third persons [*Drittwirkung*]. The following discussion is sufficient to resolve this case.").

76. *Id.* at 206:

In order to determine what is required by social norms such as ["good morals"], one has to consider first the ensemble of value concepts that a nation had developed at a certain point in its intellectual and cultural history and laid down in its constitution. That is why the general clauses [of the Civil Code] have rightly been described as 'points of entry' for basic rights into private law.

*Id.*

which renders them consistent with constitutional values, wherever possible.<sup>77</sup> Where such interpretation is possible, as especially with the open-ended “general clauses” of the Civil Code, such as Section 826, constitutional values must influence the content and application of private law rules.<sup>78</sup> But where it is not possible, the relevant provision of private law is simply invalid.

Accordingly, the still-governing Lüth principle employs both direct and indirect methods of subjecting private law to constitutional rights. As institutions bound by the Basic Law,<sup>79</sup> the civil courts have a duty to take constitutional values properly into account in interpreting and applying private law when adjudicating disputes between individuals. This duty is indeed broadly similar to the one placed on Canadian courts in adjudicating purely private common law actions.<sup>80</sup> Unlike the situation in Canada, however, it is not the only relevant constitutional duty. For if the provision of German private law governing a dispute between individuals cannot be interpreted consistently with the basic rights, it must be invalidated because these latter constitute directly applicable higher law norms.<sup>81</sup>

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77. This is how Greg Taylor describes the interpretive duty placed on the courts by the Lüth principle. See Taylor, *supra* note 63, at 199.

78. For another FCC statement of this duty and its limits, see, e.g., Blinkfüer, BverfGE 25, 256 (257) (“However, the objective order of values established by the Basic Law . . . influences the interpretation of these rules [of private law] insofar as they are capable of interpretation in light of constitutional norms [citing Lüth].”).

79. “The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law.” GG art. 1 Nr. 3 (emphasis added). Taylor notes that there is “also a growing consensus [in Germany] that the Courts, too, when adjudicating private disputes, are subject directly to the constitutional guarantees.” See Taylor, *supra* note 63, at 198.

80. It is important to appreciate that Canada operates a mixture of these two forms of indirect horizontal effect. Whereas, as we have seen, the common law at issue in private litigation is indirectly subject to constitutional rights, private law statutes are (as in Germany) directly subject. For an example, see *Re Blainey*, *supra* note 49.

81. Under the concentrated system of judicial review operating in Germany, whereby only the Constitutional Court may invalidate a statute because of its inconsistency with the Basic Law, the lower court makes a reference to the Constitutional Court to adjudicate the law’s constitutionality.

Basil Markesinis summarizes the entire German position as follows:

[I]n a public law action between an individual and the state, a constitutional right will directly override an otherwise applicable rule of public law. The constitutional right will also override a statutory provision of private law if it contravenes a constitutional right. . . . However, in private law disputes between individuals where the applicable provisions are not unconstitutional as such constitutional rights [are] said to “influence” rules of civil law rather than actually to override them. It is the duty of the court to adopt an interpretation of private law provisions which is in conformity with the constitutional rights. A certain intellectual content “flows” or “radiates” from the constitutional law into the civil law and affects the interpretation of existing civil law rules. In such cases the rules of private law are to be interpreted and applied in [the] light of the applicable constitutional norm, but it is nonetheless the civil law rules that are ultimately to be applied.

BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS* 406-07 (4th ed., 2002).

As in Lüth itself, most instances of *Drittwirkung* in practice have involved the constitutional right to freedom of expression contained in Article 5 of the Basic Law<sup>82</sup> or closely associated rights. Indeed, one prominent comparativist has suggested that the protection of such rights forms the only exception to the FCC rule of not being “dragged lightly into private law disputes.”<sup>83</sup> A second example among many is a 1984 case before the Federal Labor Court in which a press operator in a private printing shop who refused on grounds of conscience to print books that he believed glorified war was fired, and then sued for unfair dismissal. Applying the *Drittwirkung* doctrine, the court held that the constitutional value of freedom of conscience contained in Article 4 of the Basic Law<sup>84</sup> exerts a substantial influence on the interpretation and application of the relevant private employment law, which requires terminations to be “socially justified.”<sup>85</sup> Accordingly, the employee’s constitutional interest must be taken into account alongside the employer’s interests in running its business protected by that law. Finding that the employer had taken disproportionately severe action, it decided the case in favor of the employee.

82. GG art. 5:

- (1) Everyone has the right freely to express and disseminate his or her opinion in speech, writing, and pictures and freely to inform himself or herself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
- (2) These rights find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.
- (3) Art and science, research and teaching shall be free. Freedom of teaching shall not release anyone from his or her allegiance to the constitution.

Two features of this textual right are of particular significance in this regard. First, unlike the First Amendment in the United States, it is not stated negatively as a limitation on legislative power but affirmatively, as a right that “everyone” has. Second, this is one of the basic rights stated to be “limited by the provisions of the general laws.” In Lüth, the FCC held that this limit must be interpreted by means of the supplementary theory of “reciprocal effect”; i.e., just as the constitutional text suggests general laws can limit certain constitutional values, so too constitutional values affect and limit the general laws under the objective order of values.

83. Markesinis, *supra* note 16, at 64.

84. Article 4 reads:

- (1) Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy are inviolable.
- (2) The undisturbed practice of religion is guaranteed.
- (3) No one may be compelled against his or her conscience to render military service involving the use of arms. Details shall be regulated by federal statute.

GG art. 4.

85. BAGE 47 (1984), 363. The relevant private law statute was the Unfair Dismissal Protection Act, 1969 (*Kündigungsschutzgesetz*), which renders termination with notice legally effective only if it is “socially justified”; i.e., based on reasons relating to the employee’s person, the employee’s conduct, or compelling business requirements that rule out the possibility of continuing to employ the person. The case is discussed in Quint, *supra* note 62, at 274-75; Markesinis, *supra* note 16, at 58.

In the United Kingdom, the Human Rights Act of 1998 [hereinafter "the HRA"] was enacted to incorporate the European Convention on Human Rights into domestic law and amounts to a qualified constitutional revolution. On the basis of the statutory set of rights, the higher courts are empowered for the first time in British constitutional history<sup>86</sup> to call into question the validity of a subsequent Act of Parliament by declaring it "incompatible" with one of the rights. The courts do not, however, have power to invalidate or disapply the statute. Rather, the expectation, though not the legal requirement, is that the government will make use of a special "fast track" parliamentary procedure to amend or repeal it.<sup>87</sup> A major legal question surrounding the HRA, and one that had spawned a substantial academic literature even before it came into force in October 2000, is the scope of application of the protected rights. In particular, which of the three positions on the spectrum running from (a) vertical only to (b) indirect and then (c) direct horizontal effect of the Convention rights, should be adopted?<sup>88</sup>

The text of the HRA is ambiguous on this issue, and there have been influential adherents of all three positions. With at least one notable exception,<sup>89</sup> and in the continuing absence of any decision by the House of Lords, a consensus appears to be emerging among lower courts and commentators that direct horizontal effect is ruled out by Section 6(1), which obliges only "public authorities," and not private individuals, to act compatibly with the Convention.<sup>90</sup> The argument against indirect horizontal effect is that the HRA makes no reference to Convention rights applying to private litigation or to the common law; indeed it does not mention the common law at all.<sup>91</sup> In particular, the duty placed on courts by Section 3(1) to employ Convention rights as an interpretive guide applies only to legislation and not to common law.<sup>92</sup>

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86. That is, outside the European Union law context. See Gardbaum, *supra* note 2, at 713 n.20.

87. See *id.* at 733-34.

88. This literature includes Hunt, *supra* note 9; Ian Leigh, *Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?*, 48 INT'L & COMP. L.Q. 57 (1999); Markesinis, *supra* note 16; Phillipson, *supra* note 61; William Wade, *The United Kingdom's Bill of Rights*, in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 61 (1998); Richard Buxton, *The Human Rights Act and Private Law*, 116 L.Q. REV. 48 (2000).

89. That is Wade, see *supra* note 88.

90. "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." Human Rights Act, 1998, § 6(1) (U.K.).

91. See, e.g., Buxton, *supra* note 88.

92. "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Human Rights Act, 1998, § 3(1) (U.K.).

On the other hand, the major argument in favor of indirect horizontal effect is that the courts are expressly included in the list of "public authorities" obligated to act in accordance with Convention rights under Section 6(1), together with certain ministerial statements supporting this position in the course of parliamentary debate on the Act.<sup>93</sup> According to some, the inclusion of courts as "public authorities" means that they have a duty to act compatibly with Convention rights at all times, including when they are adjudicating private disputes governed by the common law.<sup>94</sup> Others argue that the inclusion of the courts should be understood to create a weaker, Canadian-style duty whereby in adjudicating existing common law causes of action, courts must simply take Convention values into account.<sup>95</sup>

Finally, in the South African case of *Du Plessis* discussed above, the well-known dissenting opinion of Justice Kriegler is sometimes understood to suggest a position on the spectrum in between indirect horizontal effect, accepted by the majority in the case and borrowed from Canada (and Germany, according to the Court), and direct horizontal effect as in Ireland.<sup>96</sup> According to Justice Kriegler:

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93. For example, the Lord Chancellor, in his speech on Second Reading of the Human Rights Bill, spoke to the issue of the scope of Convention rights. "A provision of this kind [clause 6(1)] should apply only to public authorities, however defined, and not to private individuals. . . . Clause 6 does not impose a liability on organizations which have no public functions at all." Hunt, *supra* note 9, at 438-39 (quoting H.L. Deb., Nov. 13, 1997, cols. 1231-32). Having rejected direct horizontal effect of the Act, however, he subsequently proceeded to affirm indirect effect:

We . . . believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding Convention considerations altogether from cases between individuals, which would have to be justified. We do not think that that would be justifiable; nor indeed, do we think it would be practicable.

*Id.* at 440 (quoting H.L. Deb., Nov. 24, 1997, col. 771).

Under the decision of the House of Lords in *Pepper v. Hart*, 1993 App. Cas. 593, 634 (appeal taken from Eng.) it is now established, contrary to the traditional UK position, that where legislative provisions are "ambiguous or obscure or the literal meaning of which leads to an absurdity," in order to disclose "the mischief aimed at or the legislative intent lying behind the ambiguous or obscure words," lawyers can refer to clear ministerial statements made during the passage of a bill. Accordingly, the Lord Chancellor's above statements may become admissible evidence of legislative intent on the horizontal effect of the HRA.

94. This is essentially Hunt's view, that the HRA should be understood to adopt the position that all law, including the common law at issue in private litigation, is directly subject to Convention rights. See *supra* note 9.

95. This is Phillipson's position in the UK horizontal effect debate, which he terms "weak indirect horizontal effect," as distinct from "strong horizontal indirect effect" advocated by Hunt. See Phillipson, *supra* note 61, at 833-34.

96. For example, in his account of the vertical-horizontal spectrum, Hunt, entitles Justice Kriegler's position, "Between Indirect and Direct Horizontal Effect: Application to All Law." See Hunt, *supra* note 9, at 434. By contrast, Phillipson considers it (correctly in my view) as a version of indirect horizontal effect. See Phillipson, *supra* note 61, at 826. Justice



Unless and until there is resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned . . . a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.<sup>97</sup>

This position, which Hunt terms “application to all law,”<sup>98</sup> seems to be that the invocation of any law by one private individual in a suit against another triggers the application of constitutional rights to that law. This is because all law — whether regulating relations between the individual and the state or relations among individuals, whether statute or common law — is directly subject to the constitution. Constitutional rights do not impose duties on private actors, who are free to order their relationships as they will, but it does apply to all law, including that regulating such relationships.

Both in the case itself and in subsequent academic commentary upon it, Justice Kriegler’s dissenting position has been viewed as a radical one. And so it is, but some of Justice Kriegler’s critics have unduly exaggerated its radical nature by seeming to confuse his position, which is about the scope of constitutional rights, with a position on the substance of such rights. For, even accepting his model that the invocation of a law by one private actor against another renders it subject to constitutional scrutiny, whether or not the law survives or fails that scrutiny (and so whether or not individuals can in fact “invoke the law to enforce or protect their bigotry”) will still depend on the content of the constitutional rights in a given legal system. It does not, of course, remotely follow that because *Law A* is directly subject to constitutional rights that *Law A* violates any of them.

Justice Kriegler’s position, at least as I interpret it, is in essence equivalent to the second type of indirect horizontal effect that operates in Germany.<sup>99</sup> Like the first, or Canadian, type, it is perfectly

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Kriegler’s dissenting opinion is also mentioned and excerpted in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1421-22 (1999).

97. *Du Plessis v. De Klerk*, 1996 (3) SA 850, 914-15 (CC) (Kriegler, J., dissenting).

98. Hunt, *supra* note 9, at 434.

99. Somewhat strangely to my mind, since his article so clearly demonstrates that private law is (like all other law) directly subject to basic rights in Germany, Greg Taylor denies that Germany adopts Justice Kriegler’s position and expresses extreme opposition to its radical nature on the merits. He describes it as “untenable,” as “abolishing private autonomy by elevating all private choices, when enforced by courts, to the status of state choice” and as thereby confusing public and private spheres. I can only believe that Taylor has confused the structural and substantive issues as I have described in the text. For the fact that invocation

compatible with the vertical position that only government actors are bound by the constitution. It does not subject private individuals to constitutional duties or create new constitutional causes of action against them. But it goes further than the Canadian position towards the horizontal pole in that it directly, fully, and equally subjects all law to the constitution no matter what its source (statute or common law), type (public or private law), or in what context it is relied upon (public or private litigation). Under this model, the constitution does not apply directly to one type of law and merely influence, radiate, or impose interpretive duties on another. Within the comparative constitutional law literature, this position is treated as a novel theoretical possibility only; no country is deemed to have adopted it.<sup>100</sup>

## II. RECONCEIVING THE CONSTITUTIONAL POSITION IN THE UNITED STATES

As we have just seen, the issue of the scope of application of constitutional rights is resolved within comparative constitutional law by answering the following series of questions: (1) Are individuals as well as government actors bound by constitutional rights? (2) Do constitutional rights apply to private law or common law? (3) Are courts bound by constitutional rights? (4) Do constitutional rights apply to litigation between private individuals? The answer to the first of these questions resolves only the issue of direct horizontal effect; the remaining ones address the issue of possible indirect horizontal effect. In the United States, however, the only question that is conventionally asked concerning the scope of constitutional rights is the first one, and the answer given (the state action doctrine) is supposed to supply all necessary answers to the general issue. Constitutional rights bind only the state and may be invoked only against action of the state. There is only one way in which constitutional rights apply: either directly and fully because of the state

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or enforcement of a law in private litigation subjects that law (or even the court's action) to constitutional scrutiny does not mean that either the legislature or the courts have violated any constitutional rights. This latter issue depends exclusively on the substantive provision of those rights; i.e., what the legislature or judiciary are constitutionally prohibited from doing to citizens. See Taylor, *supra* note 63, at 215-18.

100. As we have seen, South Africa has moved from indirect to direct horizontal effect between its interim and final constitution. Under the latter, however, only some of the bill of rights will have direct horizontal effect under section 8(2) but not necessarily all; the rest may well be treated under this fourth position because section 8(1) expressly states: "The Bill of Rights applies to all law, and binds the legislative, the executive, the judiciary and all organs of state." S. AFR. CONST. of 1996 ch.2 (Bill of Rights), § 8(1). As far as the UK is concerned, Hunt argues that Justice Kriegler's position is the most likely one to be adopted under the HRA, *see* Hunt, *supra* note 9, at 438-42, but there has as yet been no definitive resolution of the issue. Phillipson, by contrast, disagrees and argues in favor of adopting the Canadian (and, as he views it, the German) position, which he terms "weak indirect horizontal effect." See Phillipson, *supra* note 61, at 833-43.

action involved or not at all.<sup>101</sup> There is no second tier of indirect application. Hence the conventional view of the United States as epitomizing the vertical-only position on the theoretical spectrum. The notoriously tricky question is how exactly to draw the line between state and private action, which polices the boundary between the application and nonapplication of the Constitution.

### A. *The State Action Doctrine*

As is well-known, few commentators have a kind word to say about the Supreme Court's attempts to draw a principled line between the two.<sup>102</sup> Standard treatments variously identify three or four strands within the labyrinth of the Court's doctrine. The first is the "public function" test, which in its current, restrictive formulation holds that when a private actor exercises functions "traditionally exclusively reserved to the State," its actions will be deemed state action for constitutional purposes.<sup>103</sup> Such functions may now be limited to electoral processes (such as conducting primaries) and running a municipality, for the Court has in recent years refused to find state action under this head in operating a privately owned public utility,<sup>104</sup> resolving a dispute by exercising a state-sanctioned self-help remedy,<sup>105</sup> educating maladjusted high school students,<sup>106</sup> and administering a nursing home.<sup>107</sup>

The second strand asks conversely whether the state is significantly entangled with, or jointly participating in, the actions of a private actor. If such a "nexus" is found, the actions will be attributed to the state. Thus, the aggregate of contacts and mutual benefits between a

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101. Quint argues that on the rare occasions the Constitution is deemed to apply to private actors under the various strands of the Court's state action doctrine, it does so fully, in the same way that it would bind the state. In Germany, by contrast, the Basic Law applies far more often to private actors but less fully than when applied to government. *See* Quint, *supra* note 62, at 314-18.

102. Charles Black famously described the Court's state action doctrine as "a conceptual disaster area." Charles Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967). In 1982, Judge Friendly observed that Black's "statement would appear even more apt today." Henry J. Friendly, *The Public-Private Penumbra — Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982). *But cf.* Laurence H. Tribe, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, in CONSTITUTIONAL CHOICES 246, 248 (1985) (stating that the state action doctrine "is, in my view, considerably more consistent and less muddled than many have long supposed"). I discuss Tribe's reconstruction of the Court's case law later in this Section, *see infra* notes 140-157 and accompanying text.

103. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

104. *Id.* at 353.

105. *Flagg Bros., Inc.*, 436 U.S. at 164.

106. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

107. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

privately owned restaurant and the municipal parking garage in which it rented space were deemed sufficient to make the state constitutionally responsible for the restaurant's racial discrimination.<sup>108</sup> On the other hand, insufficient nexus was found between a private club practicing racial discrimination and the state licensing authority that regulated it,<sup>109</sup> and between a private nursing home and the state whose financial support enabled it to exist.<sup>110</sup>

A third strand makes the state responsible for private action when it "has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state."<sup>111</sup> Sometimes the cases refer to state "authorization" or "approval" of the private action, rather than "encouragement." The basic idea seems to be that while the state's constitutional responsibility for private actions should include, but not be limited to, those it mandates or coerces, responsibility should exclude merely neutral state policy towards the relevant private choices.

Although to be sure, like the first two, this third strand suffers from serious application problems (the seeming arbitrariness of whether many actions fall on one side of the line drawn or the other), it also suffers analytically from an identity problem. For the cases sometimes treat this issue not as a threshold one of state action — i.e. whether the Constitution applies — but rather as a substantive one of constitutionality. Thus, in the leading "encouragement" case of *Reitman v. Mulkey*,<sup>112</sup> involving a California constitutional amendment prohibiting governmental interference with the unconditional "right" of any person to refuse to sell or rent real estate to any other person as they choose,<sup>113</sup> the issue dividing the Court by five to four was the substantive one of whether state permission for private racial discrimination in this manner and context violated the Equal Protection Clause. No member of the Court thought there was a state action issue here at all, and only a dissenter bothered to mention it, stating without explanation that "[t]here is no question that the

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108. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

109. *Moose Lodge No. 107 v. Irisv.*, 407 U.S. 163 (1972). Although the Court rejected most of the plaintiff's constitutional claim on the state action grounds of insufficient nexus, it accepted a small part of it and struck down the liquor licensing board's regulation requiring clubs to adhere to their constitution and by-laws. See *infra* notes 273-275 and accompanying text (discussing this case further).

110. *Blum*, 457 U.S. 991 (1982); *Rendell-Baker*, 457 U.S. 830 (1982).

111. *Blum*, 457 U.S. at 1004.

112. 387 U.S. 369 (1967).

113. CAL. CONST. art. I, § 26 (Proposition 14) ("[The state] shall [not] deny . . . the right of any person to sell . . . any part of his real property, to decline to sell . . . to such person as he, in his absolute discretion, chooses.").

adoption of [the California amendment] constituted 'state action' within the meaning of the Fourteenth Amendment."<sup>114</sup>

Under the final strand, sometimes merged with the previous one, court orders enforcing certain voluntary private actions have been deemed to be state action triggering constitutional scrutiny, but not others. Thus, a court order enforcing a racially restrictive covenant entered into by white homeowners was deemed state action in *Shelley v. Kraemer*,<sup>115</sup> but in a subsequent case a court order enforcing a racially discriminatory will was not.<sup>116</sup> *Shelley* is easily the Court's most controversial state action case because it appeared to suggest that all private choices and preferences enforced by courts would now be subject to the Constitution, thus violating the basic state action doctrine distinguishing private from governmental conduct. Perhaps for this reason, the Court appears to have affirmed the consensus opinion among mainstream commentators that *Shelley* should be confined to its facts.

### B. *Transcending the State Action Doctrine*

A major thesis of this Article is that in each of the above cases, and in virtually all others, the threshold search for state action in order to trigger a constitutional claim is entirely unwarranted and unnecessary. In presenting this thesis, I do not mean merely that finding state action should often be far easier than it is sometimes made out to be, but that the search is entirely misguided. That is, I will not be presenting an internal critique — that the line between state and private action is drawn in the wrong place — but an external one: namely, that this line is irrelevant wherever constitutional review of a law is involved.

The reason is that, contrary to the standard view in comparative constitutional law, the United States does not in fact adhere to the polar vertical position, or indeed to any of the other positions on the scope of constitutional rights that exclude certain laws from full and direct constitutional review. It adheres instead to the position suggested by Justice Kriegler in *Du Plessis*. All law of whatever type

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114. *Reitman*, 387 U.S. at 392 (Harlan, J., dissenting).

115. 334 U.S. 1 (1948).

116. *Evans v. Abney*, 396 U.S. 435 (1970) (holding that a state court's enforcement of state trust laws to allow testamentary grant of land to revert to the estate upon frustration of the terms of the bequest — that the land be used as a park "for whites only" — did not amount to state action). Quint notes that some state courts have failed to find state action in the judicial enforcement of wills discriminating on the ground of religion. Quint, *supra* note 62. The cases Quint cites include *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955), *cert. denied*, 349 U.S. 947 (1955) and *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (Ohio 1974). Quint also cites state courts that have failed to find state action in the judicial enforcement of contracts discriminating on the basis of ethnic origin. These cases include *Rice v. Sioux City Memorial Park Cemetery*, 60 N.W.2d 110 (Iowa 1953), *aff'd by an equally divided court*, 348 U.S. 880 (1954), *vacated & cert. dismissed as improvidently granted*, 349 U.S. 70 (1955).

and source — whether public or private, whether statutory or judge-made, whether relied on in litigation between an individual and the state or between individuals — is directly, fully, and equally subject to the Constitution. Accordingly, whenever a law is invoked or relied on before a court, there is no threshold issue to be resolved before its constitutionality may be assessed. The only genuine issue in every case is whether that law is consistent with, or violates, the Constitution. Although no constitutional duties are thereby placed on private actors,<sup>117</sup> constitutional rights have substantial impact on (1) what individuals can lawfully be permitted or required to do, and (2) which of their interests, preferences, and actions can be protected by law. This position may usefully be termed “strong indirect horizontal effect,”<sup>118</sup> to distinguish it from the weaker version adopted by Canada and South Africa under its Interim Constitution. In these two countries, it will be recalled, common law invoked in private litigation is (or was in South Africa’s case) only indirectly and not fully or equally subject to the Constitution.

In presenting my case, it will be helpful to start by considering a recent attack on the Court’s state action doctrine. Among the many topics covered in his book, *The Partial Constitution*,<sup>119</sup> Cass Sunstein provides a brief but powerful internal critique of the doctrine for its bias in favor of “status quo neutrality” and “natural,” i.e., existing, economic distributions. This bias alone, he claims, and not a genuine search for government action, explains the outcomes of the Court’s state action cases in which “protection of interests recognized at common law is not state action, whereas protection of other interests does count as such.”<sup>120</sup> Sunstein argues that we fail to grasp this because of our continuing reliance on the pre-New Deal ideology of the common law as the baseline for determining which governmental functions are neutral and natural and as thus reflect state *inaction*. The reality, of course, is that ratifications of existing distributions through enforcement of common law rights are no more neutral, natural or “inactive” than “partisan” departures from such distributions by legislatures. Accordingly, he continues, a case such as *Shelley v. Kraemer* is a difficult state action case only because of the hold of this common law benchmark, which tells us that the Court was “acting”

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117. As a form of indirect horizontal effect, this position is accordingly quite consistent with the vertical approach and the basic state action axiom: constitutional rights bind government actors only. See *supra* notes 95-99 and accompanying text.

118. Phillipson suggests this term to distinguish the position from the “weak indirect horizontal effect” of Canada and (as he sees it) Germany that he argues the courts should also adopt for the UK under the Human Rights Act. See Phillipson, *supra* note 61, at 833-43. I have argued above, *supra* notes 62-84 and accompanying text, that Germany also employs the strong form of indirect horizontal effect.

119. SUNSTEIN, *supra* note 10, at 74-75, 159-61.

120. *Id.* at 159.

only as a neutral umpire to enforce a private agreement. But once the common law baseline of government inaction is rejected as misconceived, “how could the government’s enforcement of a racially restrictive covenant, through its courts, be anything but state action?”<sup>121</sup> The genuinely difficult question is the substantive one: “[W]hether the Constitution forbids the state’s apparently neutral use of its courts to enforce contracts, including racially restrictive property agreements. That is a hard question about the meaning of the Equal Protection Clause. It is not a hard question about state action.”<sup>122</sup>

Because his account is brief and framed by his primary interest in the issue of status quo neutrality, of which the state action doctrine is (for him) but one manifestation among many in modern constitutional law, I am uncertain how similar Sunstein’s affirmative position is to my own. He does state that “the law of contract, tort, and property is just that — law [and] should be assessed in the same way in which other law is assessed.”<sup>123</sup> On the other hand, Sunstein does not appear to question the appropriateness of the threshold state action inquiry, but rather its outcome when dealing with common law and its enforcement. Moreover, his discussion of *Shelley* focuses on the traditional issue of whether a court’s enforcement of a racially restrictive covenant is state action (of course it is, he says) and not on the constitutionality of the underlying state law being enforced. This is why I describe his critique as internal and not external, in contrast to the one I have suggested. What I am far more certain of is that Sunstein’s *argument* is far from a complete one in support of the position I have outlined. My immediate aim in what follows is to explain why this is so, and then to provide the missing parts of the argument.

Undoubtedly the dominance in the United States of the ideology that laws protecting market outcomes are natural and neutral, whereas those departing from them are extraordinary and partisan, makes Sunstein’s point a valuable and illuminating one in explaining the outcomes of many of the state action cases. The comparative materials previously introduced make it clear, however, that it is insufficient to say that because common (or private) law is law, and that law amounts to positive action by the state, then the Constitution (a) automatically applies to it and (b) in the same way as it applies to other law. The highest courts of Germany, Canada, and South Africa have all struggled self-consciously with the issue, and the latter two have clearly rejected this position.<sup>124</sup> The highest court in the United

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121. *Id.* at 160.

122. *Id.*

123. *Id.* at 159.

124. *See supra* Part I.

Kingdom may well do so too. Whatever the case in the United States, these courts do not treat private/common law in a distinct way for the naïve/ideological reason that they mistake the private sphere as law-free, as not constituted by law and therefore lacking state action.<sup>125</sup> Rather, they have affirmative reasons for distinguishing between types of laws for purposes of constitutional analysis. Put analytically, to say (1) that all law, including common law, is state action, and (2) that only state action is subject to the Constitution is not to say (3) that all law (or state action) is subject to the Constitution, or subject in the same way.

There *is* a genuine threshold issue that must be addressed before dealing with the substantive question of a law's compatibility with the Constitution, but it is not the one asked by the state action doctrine. Rather, it is a global question that once resolved systemically need not be raised in every individual case. Of course, the question is: What is the scope of constitutional norms? And once again, this global question breaks down into the series of smaller ones previously discussed. Do constitutional norms apply to all law and, if so, in the same way? Do they apply only to laws regulating relations between individuals and the state or also to laws regulating relations among private individuals? Do they apply to statute law and common law? Do they apply to laws relied upon in private litigation? Do they do so directly or indirectly? Why, and on what basis, is the answer in the United States different than that in Canada? What are the affirmative reasons for one answer rather than another in the United States? We have seen how the courts in Canada and South Africa answered these questions primarily on the basis of the relevant textual provisions in their constitutions. It might prove helpful, then, to use this same approach, rather than Sunstein's a priori argument about the nature of "state action," to see what answer it suggests for the United States.

Moreover, as our brief review of the case law indicates, state action does not function as a threshold issue only as to whether common law is subject to the Constitution, but also as to whether particular statutes and even state constitutional provisions are immune from constitutional review. Thus, in *Flagg Brothers*, the Supreme Court held that a state statute that merely permits, or "acquiesces in," a private action did not constitute state action.<sup>126</sup> And in *Reitman*, according to standard doctrine at least, there was a state action issue regarding a

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125. Although, as we have seen, Germany does directly subject all private law to the basic rights, the Lüth interpretive principle still involves distinct constitutional treatment for private law compared with public law.

126. See *supra* note 15 (discussing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)).



constitutional amendment that merely “encouraged” private racial discrimination.<sup>127</sup>

The genuine threshold question is, I will now argue, answered not by the Fourteenth Amendment’s state action requirement but by the Supremacy Clause of the U.S. Constitution.<sup>128</sup> Its answer is that all law, no matter what its source or type, is subject to the Constitution. Accordingly, the only real issue in any particular case is whether the law in question is consistent with, or violates, the Constitution; there is no separate and prior issue of state action. Once again, this is not because with any constitution, all types or sources of law are necessarily or inherently subject to its individual rights provisions, but because this is the most compelling interpretation of the U.S. Constitution’s particular answer to the issue of the scope of its rights. Other constitutions have knowingly and without false consciousness about private law and market outcomes given different answers. Whereas the threshold issue is determined once and for all by the Supremacy Clause, the real issue of substantive compatibility of a law regulating relations among private individuals in each case turns on the content and interpretation of the relevant constitutional rights provisions of the Constitution.

How does the Supremacy Clause provide the U.S. Constitution’s answer to the global threshold question? First, the Supremacy Clause states that the Constitution (as well as congressional acts and treaties) is the “supreme law of the land.” In a straightforward sense, this would not be true if state common law, or any other type of state law, were not subject to it. As we have seen,<sup>129</sup> the Canadian Supreme Court interpreted the supremacy clause of Section 52(1) of the Charter to mean that its provisions apply to the common law. At the same time, it interpreted the applications clause of Section 32(1) to mean that the Charter did not apply to private litigation relying on the common law unless it was the basis of some legislative or executive action. Regardless of whether this is a compelling interpretation of Section 32(1), there is no equivalent in the U.S. Constitution that would require any such qualification of the basic position that its rights provisions apply to the common law.

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127. See *supra* notes 101-115 and accompanying text (discussing the strands of the state action doctrine).

128. U.S. CONST. art. VI, § 1, cl. 2.:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

129. See *supra* notes 45-48 and accompanying text.

Second, under the Supremacy Clause, the Constitution expressly binds state courts.<sup>130</sup> As we have seen, the *absence* of such a provision in Canada and South Africa, and the textual application to the legislative and executive branches only, was an important and explicit reason that the common law was held not to be directly subject to the Constitution unless relied on by these branches of government. By contrast, the inclusion of the courts (though not Parliament) among the “public authorities” bound to act compatibly with the Convention is the central argument in the United Kingdom for the indirect horizontal effect of the Human Rights Act.

Third, the Supremacy Clause ends by stating that the Constitution (as well as federal statutes and treaties) trumps “any Thing in the Constitution or Laws of any State.” As the Court famously affirmed in *Erie v. Tompkins*,<sup>131</sup> state common law is part of the “Laws of any State.” It is true that the Clause does not refer expressly to state common law, but it would be a perverse interpretation of “Laws of any State” to exclude state common law, particularly as it is typically subordinate to state statutory and constitutional law. Once again, there is nothing equivalent to the Canadian and South African application clauses to provide an affirmative textual basis for excluding the common law at issue in ordinary private litigation from the scope of fundamental rights. For the constitutional courts in these countries did not simply interpret the reference to “laws” in their supremacy clauses as excluding the common law, as such a conclusion would require in the United States.

Thus, on the important questions of whether the Constitution applies to (a) courts and (b) state common or private law, the relevant text of the U.S. Constitution speaks clearly and consistently in answering both in the affirmative. By contrast, it was the tension between the answers to these two questions in both Canada and South Africa that caused their highest courts to arrive at a less radical and straightforward position than is the case in the United States: all law, no matter what its source or type, is directly and fully subject to the Constitution. Accordingly, comparative materials have helped us understand both why Sunstein’s argument is insufficient to justify the proposition that the Constitution applies to all law, and what that sufficient argument is.<sup>132</sup>

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130. U.S. CONST. art. VI, § 1, cl. 2 (“[A]nd the Judges in every State shall be bound thereby . . .”).

131. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

132. Although I am here making a textual and comparative contextual (reading the Supremacy Clause in light of similar comparative textual provisions) argument for my thesis, I believe the thesis itself is supported by other types of constitutional argument, such as

Although the fourth position on the spectrum adopted by the United States and shared with Germany is neither formally nor substantively equivalent to direct horizontal effect, as in Ireland, it is closer to this polar position than is the indirect horizontality adopted in Canada. As a matter of constitutional structure, individual rights provisions have a greater impact on private actors in the United States because the laws regulating their relations with each other are fully governed by constitutional rights, and not merely “influenced” or “affected” by constitutional values. The common law at issue in private litigation is subject to the Constitution in precisely the same way as statutory private and public law. This is obviously a surprising conclusion that runs counter to the conventional wisdom, in which the state action doctrine casts the United States as the paradigmatic representative of the polar vertical position.<sup>133</sup>

This radical conclusion, and the constitutional irrelevance of the traditional state action enquiry that it implies, should immediately be qualified in the following four ways. First, like the others, the fourth position on the spectrum is still a formal position in that it does not tell us whether any particular law regulating relations among private individuals violates the Constitution.<sup>134</sup> To answer this, I continue the analysis to address the substantive issue in Part IV.

Second, my thesis is that the threshold state action issue is irrelevant wherever a law is challenged as unconstitutional because all laws are subject to the Constitution under the Supremacy Clause. Since, however, the government’s constitutional duties are obviously not limited to the content of its laws,<sup>135</sup> the case-by-case determination of state action may still be relevant for other types of governmental conduct.

Third, it should be clear that I am arguing for the abolition of the state action doctrine in a different, narrower sense than Erwin Chemerinsky who, in his well-known article, is (in comparative terms)

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history and precedent, as well as what might be termed reflective constitutional common sense. For my argument on precedent, see *infra* notes 161-170 and accompanying text.

133. See *supra* note 9.

134. Neither does the fourth position tell whether overall, the U.S. Constitution has greater total impact on private actors in practice than other constitutions. See *supra* note 16.

Although I readily acknowledge that this fourth position, like the purely vertical one, is formal, I hope I have explained why it is not merely “banal” or “a conceptual truth,” as Larry Alexander characterizes the related view, which he accepts, that the Fourteenth Amendment’s state action requirement is satisfied whenever exercises of private power take place against a background of laws. See Alexander, *supra* note 11, at 364, 377. First, as I have shown, it is not a universal feature of constitutional systems, and in self-consciously rejecting it, other countries presumably believe something tangible is at stake. Second, as I will argue in Part IV, it is quite conceivable that systematic awareness of the indirect effect of constitutional rights on private actors might affect their substantive interpretation.

135. See, e.g., LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND? (1988).

arguing for direct horizontal effect.<sup>136</sup> My thesis is that the state action doctrine should be abolished because it misstates the existing constitutional position on the reach of individual rights, properly understood. The United States already adheres to a strong version of indirect horizontal effect: all law is subject to the Constitution. Accordingly, there should be no threshold issue in each case of whether the law at issue — be it constitutional, statutory, judge-made, or administrative — amounts to state action. State laws are not subject to the Constitution because they are state action under the Fourteenth Amendment but because the Supremacy Clause says they are. The function of the Fourteenth Amendment is to help resolve the substantive issue of which laws violate the Constitution, not the structural issue of scope.

Fourth, to say that all laws are subject to the Constitution is not to say that a law is necessarily or automatically challengeable in every actual piece of litigation; there may, and indeed must, be some procedural limitations. Let me spell out what precisely my thesis does and does not entail in this regard.

The Constitution applies to all law, including private and common law. It applies in “purely private litigation” to the law at issue in the particular case. Although private actors are not bound by the Constitution, the laws that they invoke and rely on in actions inter se are so bound. Accordingly, private actors are unable to rely on an unconstitutional law in any ordinary, nonconstitutional cause of action: a plaintiff cannot successfully sue or a defendant defend on the basis of an unconstitutional law. Thus, if one private actor sues another under state law *A*, the defendant may allege the unconstitutionality of that law, as for example the state libel law in *New York Times*. Conversely, if in a private suit the plaintiff sues under state law *B* and the defendant relies on state law *C* for a defense, the plaintiff may allege the unconstitutionality of law *C*. An example of this scenario is *Reitman*, where the rejected tenant plaintiff sued his would-be landlord under the California code provision banning racial discrimination in housing,<sup>137</sup> and the landlord attempted to rely in his defense on Proposition 14, the constitutional amendment purporting to trump that provision which was held to violate the Equal Protection Clause. Thus, in *Flagg Brothers*, had Mrs. Brooks sued the warehouseman for the tort of conversion, the defendant’s reliance on the state Uniform Commercial Code as a defense to the action should have put the constitutionality of that state statute squarely and properly at issue.

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136. Chemerinsky, *supra* note 27.

137. For the wording of the amendment, see *supra* note 112.

By contrast, there can be no constitutional cause of action against another private actor for breach of a constitutional duty, because private actors have none. In this sole respect, the result in *Flagg Brothers* was correct, as Mrs. Brooks brought a § 1983 action for violating her constitutional rights against Flagg Brothers.<sup>138</sup> To be clear, the reason is not that the relevant provision of the Uniform Commercial Code fails a threshold test for review on the merits, but that one private actor has no cause of action against another for the statute's unconstitutionality.<sup>139</sup> This proposition, which distinguishes the U.S. position from direct horizontal effect, is quite different from the proposition that defines the U.S. position of strong indirect horizontality: the law relied on in the course of ordinary nonconstitutional litigation by one private actor against a second is directly and fully subject to the Constitution.

Accordingly, complete immunity from constitutional scrutiny applies only to actions by private actors (a) that do not invoke, or otherwise rely on, any law, or (b) for which the victim has no relevant cause of action. As far as the latter is concerned, there may occasionally be situations where, although a private actor relies on a law, say, to discriminate on the basis of race, there is no relevant, existing nonconstitutional cause of action that the victim can employ as plaintiff to challenge the law. So where *A*, a private club that denies membership to African Americans, relies on the rules of property law to physically eject *B*, an African American, from its premises, *B* may sue for the tort of assault and allege that the law relied on by *A* is unconstitutional. But where *C* relies on the rules of property law to give change only to white beggars and not black, there may be no common law tort or statutory cause of action that would enable a black beggar to challenge the constitutionality of the rules of property law relied on.<sup>140</sup>

### C. *Transcending Versus "Refocusing" the State Action Inquiry*

In the concluding chapter of his book, *Constitutional Choices*,<sup>141</sup> entitled "Refocusing the State Action Inquiry: Separating State Acts from State Actors," Laurence Tribe might possibly be understood to suggest that properly reconstructed, the position for which I have just

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138. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

139. Accordingly, my view is that when challenging an underlying law, "constitutional tort" actions under § 1983 should be understood to lie only against the state and not against private actors. This is, of course, in line with the Court's interpretation of § 1983's requirement of "under color of state law."

140. This threshold question of the requirements for subjecting the rules of property law to constitutional scrutiny is obviously different from the substantive question of the constitutionality of these rules. This latter question is treated *infra* Part IV.

141. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985).

argued is in fact the Court's current position in state action cases. If so, my thesis could then be thought of as a systematic and principled justification of this case law. It is, however, not so. Even Tribe's insightful, "best case"<sup>142</sup> reconstruction of the Court's jurisprudence reveals the continuing hegemony of the traditional two-prong test with a threshold state action inquiry that fails to treat the existence of a challenged state law relied on by one of the parties as sufficient for constitutional review on the merits. His account demonstrates, therefore, that the Court's prevailing approach is inconsistent with mine.

Arguing counterculturally that the Court's state action doctrine is "considerably more consistent and less muddled than many have long supposed,"<sup>143</sup> Tribe sets himself the task of "simply . . . develop[ing] the structure of that doctrine — less to defend it than to lay bare its essential logic, the better to expose it to such defense or attack as it may properly invite."<sup>144</sup> His essential claim for my purposes is that the Court's state action jurisprudence already permits the underlying state law in any case to be subject to substantive constitutional review. The only requirement imposed by the Court is that such litigation be "properly structured" and the state law be "properly called into question."<sup>145</sup> Accordingly, in cases such as *Flagg Brothers*, the Court's refusal to adjudicate the constitutional merits of the state law at issue in litigation between private actors on the grounds that the threshold issue of state action was not satisfied, did not amount to an immunity from review. Had the plaintiff "properly structured" her case, she could have challenged the law itself. State action rhetoric notwithstanding, up to this point, Tribe's reconstruction of the case law might be consistent with what I have argued is constitutionally mandated — depending on the requirements for proper structuring. Once we see what these are, however, the inconsistency between the two accounts is apparent.

Tribe suggests the Court employs two different "lenses" in state action cases. The first, "the close-nexus lens," seeks to determine whether the actor causing injury is a state or private actor. The Court, for example, utilized this lens in *Flagg Brothers* when it initially found the injurer to be a private actor with no sufficient involvement of any state actor.<sup>146</sup> The second, "telephoto lens," by contrast, focuses not on

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142. *Id.* at 248.

143. *Id.*

144. *Id.*

145. *Id.* at 253-59.

146. *Flagg Bros., Inc.*, 436 U.S. at 157. This was the Court's first rationale for denying state action. *Id.* at 157-64. The second was that state laws merely acquiescing in private action did not amount to state action. *Id.* at 165-66. My position regarding this first lens is that (a) Tribe is undoubtedly descriptively correct that the Court employs it frequently, and

the identity and status of the injurer but on the underlying law itself as the target of the lawsuit. According to Tribe, in order to place the constitutionality of the background law at issue and to bring this second lens into play, it is necessary for the litigant to adopt the "proper procedural posture." Tribe describes two. The first is that the injured party may directly sue the relevant state officials who possess the power under the state law at issue to put private actors in a position to inflict injury.<sup>147</sup> This would not, of course, permit a private defendant to challenge the underlying law relied on by a private plaintiff as, for example, in *New York Times*.

The second way to obtain federal adjudication of the constitutional merits of a state law at issue is the more important one for my purposes, and this is where the similarity of Tribe's account of the case law to my thesis ends. This is to sue the injurer, even if a private party, in state court and seek review in the Supreme Court if and when the state court invokes the disputed state law to deny relief. According to Tribe, that invocation by the state court becomes state action reviewable on the merits by the Supreme Court.<sup>148</sup> The same analysis would apply where a defendant challenges the constitutionality of the state law relied on by the plaintiff in state court, as in *Shelley* and *New York Times*. With regard to this second way, Tribe reports that the Court has drawn a distinction between state laws that *mandate* a challenged private action and those that merely *permit* or authorize it. Laws mandating private action may be directly challengeable on the merits in federal court; but with permissive laws, filing in state court first is required to trigger state action because "a federal court will hold that the state is not implicated by its mere acquiescence in private behavior."<sup>149</sup>

I have three comments on Tribe's reconstruction of the Court's case law, although unfortunately, due to the self-imposed limitation on his task, we do not know whether he himself believes the reconstructed position "properly invite[s]" support or critique. First, it is unclear to me whether this second, roundabout way of guaranteeing

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(b) I am not committed to arguing that it is wrong for it to do so. I am committed to the position that such a threshold state action nexus is not necessary for triggering constitutional review on the merits and that the Court is wrong when it holds that it is. The close-nexus lens will usually function as a second, separate basis for review over and above the underlying state law relied on by one of the private parties.

147. TRIBE, *supra* note 141, at 255. Under the current Court's expansion of the Eleventh Amendment and the doctrine of state sovereign immunity, the *Ex parte Young* action of suing state officials — rather than the state itself — is the only way a private individual is able to do so. Erwin Chemerinsky has attacked this expansion as inconsistent with the Supremacy Clause, among other constitutional principles. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1210-12 (2001).

148. TRIBE, *supra* note 141, at 257.

149. *Id.*

review on the merits of an underlying state law correctly states the Court's position, particularly regarding "permissive laws." I am less confident than Tribe that had Mrs. Brooks sued and lost in state court, the majority would then "certainly" have considered the court order to amount to state action and subjected the New York statute to constitutional review on the merits. After all, treating a state court order enforcing a permissive law as state action is precisely what conventionally makes *Shelley* so controversial. To my mind, the *Flagg Brothers*'s footnote cited by Tribe as support for his claim does not obviously bear his interpretation; it seems to suggest only that Mrs. Brooks is not necessarily without judicial remedy under *state law*.<sup>150</sup> If so, this would be on a par with the Chief Justice's statement in *DeShaney v. Winnebago County Department of Social Services* to the effect that although state inaction in the face of private violence against an individual does not give rise to a federal constitutional claim, it may result in liability under state tort law.<sup>151</sup> In any event, Tribe does not present a case that clearly and unequivocally stands for the proposition he suggests.<sup>152</sup>

Second, even if we accept as descriptively accurate the private litigation method of bringing the second lens to bear on the underlying state law, the Court would still not be treating the state *law* allegedly violating one individual's constitutional rights and relied on by the other as itself sufficient to trigger review as my thesis requires. Rather, it requires a state *court order* enforcing the law before an individual's constitutional rights may be adjudicated in federal court.<sup>153</sup> The

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150. *Flagg Bros., Inc.*, 436 U.S. at 161-62 n.11:

There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the 'surrenders of property' to which [Justice Stevens's] dissent refers, and that the compliance of Flagg Brothers with applicable New York property law would be reviewed after customary notice and hearing in such a proceeding.

*Id.*

151. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989).

152. The case that Tribe cites as "perhaps the strongest direct authority for the efficacy of this approach," *Martinez v. California*, 444 U.S. 277 (1980), *TRIBE, supra* note 141, at 162, does not even appear to be an example of the second way to obtain federal adjudication of the constitutional merits of a permissive state law. First, the plaintiffs sued the state of California, not a private defendant, for its own alleged violation of their murdered daughter's rights under the Fourteenth Amendment. Second, the underlying state law at issue, which conferred absolute immunity on state parole boards for injuries caused by parolees, was not a law permitting private actors to *do* anything. Rather, it *prohibited* them from holding the state liable.

153. Tribe's description is quite accurate. On this point, Chief Justice Rehnquist was rather explicit in *Flagg Brothers*:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a state, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.



absurdity of this *Shelley*-style requirement of two sets of state action (or, more accurately, both a law and a state actor relying on it) appears to be appreciated by Tribe in his following comment, although again he says nothing explicit by way of critique:

The real “state action” in *Shelley* was Missouri’s facially discriminatory body of common and statutory law — the quintessence of a racist state policy. The state court’s refusal to invalidate the racist covenant before it was simply the overt state act necessary to bring the state’s legal order to the bar of the United States Supreme Court.<sup>154</sup>

Why isn’t the state law at issue the “necessary overt state act,” particularly if it is the “real” state action here? Of course, the simple and parsimonious answer is that the Supremacy Clause requires the state law to be directly challengeable by an injured individual without the roundabout route of first having to obtain a state court order, indeed without having to identify anything that counts as state action at all. *It is the law itself* that is subject to constitutional review in the first place and not only a state court order enforcing it, although to be sure, a constitutional law may also be unconstitutionally enforced.<sup>155</sup>

Third, the distinction between mandatory and permissive state laws — which Tribe reports as determining whether this roundabout route is necessary in private litigation — should be constitutionally irrelevant. All state laws, permissive and mandatory alike, are equally and directly subject to the Constitution under the Supremacy Clause. Accordingly, this distinction cannot determine whether a law is directly challengeable on the merits in federal court.<sup>156</sup> The Court’s explanation for its distinction, that the state is not responsible for its “mere acquiescence in a private action,”<sup>157</sup> suggests that the state is not “responsible” for its own laws, another constitutionally absurd

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*Flagg Bros., Inc.*, 436 U.S. at 160 n.10.

154. TRIBE, *supra* note 141, at 260.

155. In Part IV, I distinguish between two separate ways in which a constitutional law may be unconstitutionally enforced: (1) where the action of the state enforcer is independently and contingently unconstitutional, such as a judge discriminating on the basis of race in administering the death penalty; and (2) where application of a generally permissible law to specific circumstances necessarily involves unconstitutional conduct. In this category, I give the example of enforcing a racially restrictive covenant.

There is also the issue of standing to take into account. In general, laws are only challengeable when they have actually harmed or threaten to harm a specific individual, that is, typically, when they are enforced or are likely to be enforced. This procedural point about when a law can be challenged does not, however, mean that it is the enforcement of the law and not the law itself that is subject to the Constitution. Rather, the enforcement is the occasion and neither the cause nor the subject of the constitutional review. *Cf. supra* note 152 (quoting Chief Justice Rehnquist in *Flagg Bros., Inc.*, 436 U.S. at 160 n.10).

156. Assuming federal courts otherwise have jurisdiction of the case. Recall, there must be a non-constitutional cause of action available to a plaintiff challenging a state law relied on by the defendant, although this is as true in a state as in a federal court.

157. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978).

proposition. Accordingly, neither the “overt state act” nor the “merely permissive state law” rationale identified by Tribe in the Court’s case law for denying immediate and direct adjudication on the constitutional merits of state laws alleged to violate an individual’s constitutional rights is consistent with the strong indirect horizontal effect required by Article VI.<sup>158</sup> They are both creatures of the misguided, case-by-case, threshold issue that must be resolved before a law can be subject to constitutional scrutiny, and they may well result in some challenges failing to be heard without justification.

In fact, the distinction between mandatory and permissive laws that the Court employed to determine whether there was state action in *Flagg Brothers* was an invention of Chief Justice Rehnquist in that case.<sup>159</sup> The distinction had been relied on previously only for: (a) decisions of a state agency or official<sup>160</sup> (i.e., not for laws) and (b) the *substantive* issue of a law’s consistency with the constitution.<sup>161</sup> In *Flagg Brothers* itself, Justice Stevens’s dissent rejected Rehnquist’s distinction and strongly suggested the position presented in this Article, citing no less an authority for it than *The Civil Rights Cases* of 1883.<sup>162</sup> According to Stevens:

The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. . . . The focus is not on the private deprivation but on the state authorization. “[W]hat is always vital to remember is that it is the *state’s* conduct, whether action or inaction, not the *private* conduct, that gives rise to constitutional attack.” . . . The State’s conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged. . . . “[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of laws*. . . . The wrongful act of an individual, *unsupported by any such authority*, is simply a private wrong. . . .”<sup>163</sup>

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158. TRIBE, *supra* note 141, at 257, 260.

159. See *supra* note 15 (discussing *Flagg Brothers*).

160. For example, in support of his position, Rehnquist quoted from the Court’s opinion in *Jackson v. Metropolitan Edison* which involved a due process challenge to the termination of services for non-payment by a privately owned utility company. *Flagg Brothers v. Brooks*, 436 U.S. 149, 164 (1978) (“Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of a proposed practice by *ordering it*, does not transmute a practice initiated by the utility and approved by the commissioners into ‘state action.’” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974))).

161. As, for example, in *Reitman v. Mulkey*, 387 U.S. 369 (1967). For discussion of this substantive issue in *Reitman*, see *infra* notes 243-255 and accompanying text.

162. 109 U.S. 3 (1883).

163. *Flagg Brothers, Inc.*, 436 U.S. at 169-77 (Stevens, J., dissenting) (quoting *The Civil Rights Cases*, 109 U.S. at 17) (emphasis added).

Justice Stevens is not entirely a lone voice in modern state action cases. Although no justice has either described the Constitution's position on the reach of individual rights into the private sphere in a systematic way or identified the Supremacy Clause as its straightforward source, the position itself has been repeatedly relied on in particular cases by both majorities and dissenters.

Thus, in *Reitman*, even though the law at issue permitted but did not mandate private racial discrimination in housing and was challenged in the context of private litigation, the majority did not even acknowledge a threshold state action issue before adjudicating the constitutional merits under equal protection. Justice Harlan's dissent from the substantive finding of unconstitutionality, however, did point out that "[t]here is no question that the adoption [of a state constitutional amendment] constituted 'state action' within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws."<sup>164</sup> Similarly, whereas the majority in *Burton v. Wilmington Parking Authority*<sup>165</sup> famously analyzed the private racial discrimination of the restaurant to be attributable to the state because of its involvement as landlord, Justice Stewart's concurrence reached the same result for the plaintiff "by a route much more direct than the one traveled by the Court."<sup>166</sup> His route subjected to constitutional review (and invalidated) the state statute relied on by the state supreme court that permitted racially discriminatory refusals of service.<sup>167</sup>

Most on point and decisive for the general thesis of this Article, however, is *New York Times v. Sullivan*,<sup>168</sup> more typically thought of as a seminal free speech rather than state action case. At the beginning of his opinion for the Court, Justice Brennan briefly disposed of the state action issue that the state supreme court had relied upon to insulate the trial court's damage award from constitutional review. In case this issue is not obvious, recall that *New York Times* involved common law

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164. *Reitman*, 387 U.S. at 392 (Harlan, J., dissenting).

165. 365 U.S. 715, 723-26 (1961).

166. *Burton*, 365 U.S. at 726 (Stewart, J., concurring).

167. *Id.* at 726-27 (Stewart, J., concurring). The state statute permitted the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers . . ." *Id.* at 717 n.1. Justice Stewart argued that: "There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." *Id.* at 726-27 (Stewart, J., concurring).

In dissent, Justices Frankfurter and Harlan disagreed that the Delaware state supreme court had in fact so interpreted the statute, though not with Stewart's conclusion if it had, and voted to remand the case to the state court for clarification of its interpretation.

168. 376 U.S. 254 (1964).

litigation between private parties in which the only “state action” was the court order against the newspaper. This, of course, places the case in the very same category as *Shelley v. Kraemer*, and as the type of case *not* subject to Charter rights in Canada.<sup>169</sup> Accordingly, the state supreme court’s rejection of the *New York Times*’ constitutional claim on the basis that “[t]he Fourteenth Amendment is directed against State action and not private action”<sup>170</sup> might have been considered sound. And yet, the U.S. Supreme Court swatted away this proposition as having “no application here” in a mere three sentences:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>171</sup>

Thus, the critical threshold proposition for which *New York Times* stands is that a state rule of law at issue in private litigation, whether common law or statute, is always an exercise of state power subject to full and direct constitutional review. As such, it clearly affirms the distinctive U.S. position on the issue that I am presenting in this Article.

#### D. Application to the Leading Cases

Although this Article has struggled to transcend rather than engage the state action labyrinth, it might nonetheless be helpful to illustrate how the state action issue in some of the leading cases would be analyzed under the alternative approach to the scope of constitutional rights here prescribed.

In *Shelley v. Kraemer*,<sup>172</sup> the common law of (racially) restrictive covenants relied on by the plaintiffs should have been directly subject to constitutional review, just like the common law of defamation relied on by the plaintiff in *New York Times*. No possible distinction between the two common law rules — mandatory versus permissive, state-

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169. As we shall see in looking at the Canadian case of *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. See *infra* notes 202-207 and accompanying text.

170. *New York Times*, 376 U.S. at 265 (quoting *New York Times Co. v. Sullivan*, 144 So. 2d 25, 40 (Ala. 1962)).

171. *Id.* (citation omitted).

172. 334 U.S. 1, 22 (1948).

formulated policy versus incorporation of private will<sup>173</sup> — alters the simple fact that all laws are subject to the Constitution.<sup>174</sup>

In *Marsh v. Alabama*,<sup>175</sup> the well-known “company town” case, the issue should not have been whether a company town is to be deemed a private or a state actor, but whether the state criminal trespass law applied to Marsh, the Jehovah’s Witness, was unconstitutional. The town was relying on the state law, not its own rules, to punish Marsh, so there was no need to determine whether the town had a constitutional duty as a state actor. The issue was rather whether the state violated its own constitutional duty by having a law of this sort.

Similarly, in *Burton v. Wilmington Parking Authority*,<sup>176</sup> under the Court’s analysis the issue was whether the restaurant’s racial discrimination should be attributable to the state because of the nexus between the state and the restaurant. I have already mentioned Justice Stewart’s alternative and more direct approach: subjecting the state law permitting restaurants to refuse service “based exclusively on color” to constitutional review.<sup>177</sup>

As detailed above, *New York Times* and *Reitman* correctly (and quickly) disposed of their respective state action issues: both the common law at issue between private litigants and enacted law that is merely permissive of private decisionmaking are subject to constitutional review on the merits. In *Moose Lodge No. 107 v. Iris*,<sup>178</sup> as in *Burton*, the issue for the majority was whether the private establishment’s racially discriminatory policies amounted to state action due to the degree of nexus between it and the government agency. The Court held that Iris’s constitutional claim failed this threshold inquiry and so did not reach the merits.<sup>179</sup> The alternative, one-step approach asks whether the state’s liquor licensing laws unconstitutionally authorized, encouraged, or enforced private racial discrimination.<sup>180</sup> Finally, the Court in *Flagg Brothers* was mistaken to suggest that a law authorizing private actors to deprive persons of

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173. This distinction, offered in explanation for the different outcomes of state action cases involving court orders, is suggested by Quint, *supra* note 62, at 268-72.

174. Like Tribe, *supra* note 102, Sunstein, *supra* note 20, relies on the state court order enforcing the common law of restrictive covenants and not the law itself as the state action triggering review on the merits. I discuss the substantive issue of the constitutionality of the common law at issue in *Shelley*, *infra* notes 239-241 and accompanying text.

175. 326 U.S. 501 (1946).

176. 365 U.S. 715 (1961).

177. As pointed out at *supra* note 166, dissenting Justices Frankfurter and Harlan disagreed that the state supreme court had in fact interpreted the statute in this way.

178. 407 U.S. 163 (1972).

179. *Id.* at 175-77.

180. This was in fact the analysis of that part of the Court’s opinion striking down the liquor board’s regulation requiring every club to adhere to its constitution and by-laws. *Id.* at 177-79.

property without their consent is immune from constitutional review. To be sure, as I have discussed, the proper procedural posture for challenging the state statute at issue required suing either the state directly or Flagg Brothers under a nonconstitutional cause of action.

### E. *Towards a Normative Defense*

I now turn to the task of explaining why the strong version of indirect horizontal effect that I have argued the United States should be understood to have adopted is not only analytically but also normatively consistent with the basic principle that private individuals are not bound by the Constitution. Both in response to *Shelley* and in the Court's opinions in *Flagg Brothers* and *Lugar v. Edmonson Oil Co.*,<sup>181</sup> concerns were raised that finding state action in these situations would mean that henceforth all "purely private litigation" would be subjected to constitutional review, even where private actors seek legal enforcement of entirely voluntary transactions (e.g., contracts and wills) or private property rights (e.g., trespass laws). Indeed, this concern expresses why *Shelley* was and remains such a controversial case, and why subsequent courts and commentators have restricted *Shelley* to its facts to ensure the concern does not become a reality.<sup>182</sup> Since the position I am arguing for requires precisely what *Shelley*'s critics fear by subjecting these laws and all others relied on in "purely private litigation" to the Constitution, how do I address what I take to be the underlying normative objection that this approach destroys individual autonomy by constitutionalizing private choices?

Before responding directly to this challenge, let me first address a couple of points that are helpfully clarified by it. First, contrary to the majority in both *Shelley* and *Flagg Brothers*<sup>183</sup> (and also Tribe and Sunstein), from the perspective of review on the merits, whether a state court order does or does not constitute state action is a nonissue, not merely an easy one. The relevant issue is whether the court-made law relied on by one private actor against another is subject to the

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181. 457 U.S. 922, 935 (1982). As the Court wrote:

[T]he party charged with the deprivation [of a right] must be a person who may fairly be said to be a state actor. . . . Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

*Id.* at 935.

182. See, e.g., *supra* notes 114-115.

183. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, (1978). There the Court wrote:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that *the mere existence* of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no process or state officials were ever involved in enforcing that body of law.

*Id.* at 160 n.10 (emphasis added).

Constitution, to which the clear answer under the Supremacy Clause is yes.<sup>184</sup> This is not to say, however, that a state court's enforcement of a law may not be independently unconstitutional as, for example, where it only enforces racially restrictive covenants against African Americans.

Second, unlike in Canada and the United Kingdom, in the United States the issue of horizontal effect does not peculiarly revolve around the status of the common law. In fact, the common law issue is essentially a red herring. Just as it is irrelevant for current purposes whether a plaintiff suing a *state* alleges the unconstitutionality of a common law rule or a statute, the distinction is similarly irrelevant in "private" litigation where one individual alleges the law relied on by the other violates his or her constitutional rights. So-called "purely private litigation" is no less private if the law at issue is statutory, and no more if it is judge-made. Here, *New York Times* should have been our guide and not *Shelley*, which has been a massive distraction. As we have seen, in *New York Times*, the state action issue was barely present and the case properly focused on the substantive issue of whether the First Amendment places limits on state libel law.<sup>185</sup> Nothing in the case turned, nor should have turned, on whether the state libel law at issue happened to be statutory or common law.<sup>186</sup> *Shelley* distracted us not only by asking where is the state action when "law" is sufficient to trigger substantive review, but also by suggesting that the common law source of the law enforced by the court made the case particularly troubling and difficult. But nothing relevant about the case would have been any different had the restrictive covenant law at issue been statutory. Accordingly, as my thesis requires and *New York Times* once again illustrates, neither the source of the law at issue (public or private, statute or common law) nor the identity of the parties to the litigation (private individual versus the state, or two private individuals) has any bearing on whether the Constitution applies. This brings us back to the one legitimate concern raised by my thesis: How is it normatively consistent with the principle that the Constitution binds only government actors? Doesn't it sacrifice individual autonomy and private choice?

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184. Once again, the language of *The Civil Rights Cases*, 109 U.S. 3 (1883), is apposite here: "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws. . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong. . . ." *Id.* at 17.

185. *See supra* notes 167-170.

186. In fact, as the Court noted, it was partially both. The common law of defamation was "supplemented" by an Alabama statute requiring a public officer to make a demand for retraction before the officer can sue. *New York Times Co. v. Sullivan*, 376 U.S. 254, 261 (1964) (citing ALA. CODE § 914 (1958)).

The full answer has both a formal and a substantive component. Formally, subjecting all state law to the Constitution, as the Supremacy Clause does, imposes a duty only on state actors (including courts) not to make, or permit reliance on, laws that violate it. Subjecting the law at issue in private litigation to the Constitution means only that a private actor will not be able to rely on an unconstitutional law since it will be invalidated or unenforceable. To be sure, this may adversely affect private actors compared to the alternative, and can result in the legal liability of a defendant attempting to employ an unconstitutional law as a shield, which means the losing party is burdened by a constitutional right.<sup>187</sup> In most cases, however, the losing party will likely be the plaintiff seeking to rely on and enforce the unconstitutional state law, as in *New York Times* and *Shelley*, which means the plaintiff simply fails to recover.

The substantive part of the answer is that the strong version of indirect horizontal effect recasts the debate about autonomy in a way that recognizes the autonomy interests of both actor and acted upon. Unlike the polar vertical and horizontal positions, it does not categorically privilege the autonomy of either group. Rather, it enforces a limited redistribution of autonomy protection, as it were, from agents to victims of private actions that would be unconstitutional for the government to perform. Accordingly, even though a private actor is unable to rely on an unconstitutional law in private litigation, the actor's private status nonetheless remains important because there are still many other actions the individual may take that the government may not.

This again points to a key difference between (a) the strong form of indirect horizontal effect and (b) direct horizontal effect (as in Ireland): the former subjects all *law* to the constitution, the latter all *action*. Thus, as Justice Kriegler pointed out in his dissenting opinion in *Du Plessis*, as far as the *constitution* is concerned, private actors are free to engage in acts of race and sex discrimination, abridgment of free speech, and preference for religion.<sup>188</sup> This is, of course, no less the case because some or all of these acts may in fact be proscribed by statutory or common law.<sup>189</sup>

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187. This occurred, for example, in *Reitman v. Mulkey*, 387 U.S. 369 (1967), where the successful plaintiff obtained damages and an injunction against the defendant landlord who in refusing to rent to Mulkey relied on the California constitutional amendment, Proposition 13, permitting private racial discrimination in housing, which was held to violate the Equal Protection Clause. *Id.* at 373-75, 379-81.

188. See *supra* note 96 and accompanying text (quoting Justice Kriegler's dissenting opinion in *Du Plessis*).

189. Once again, it would not be the case that, as far as the Constitution is concerned, private actors are free to engage in these acts if the state had positive duties to prohibit them. See *supra* note 10.



The final part of the answer to the challenge is that the strong form of indirect horizontal effect reflects and expresses the American conception of an individual constitutional right. That is, it is a right not to be subjected to, harmed, or burdened by a law that violates the Constitution, no matter who relies on the law to do the harming. Its protection is not limited to situations and contexts where the government seeks to rely on its own law, as in a criminal prosecution or a civil suit filed by state or federal officials. The New York Times' First Amendment freedoms are protected not only where the government is directly seeking to limit the newspaper's speech but also where a private individual can achieve the same result by relying on a law permitting him or her to do so. By contrast, the weak form of indirect horizontal effect as practiced in Canada does draw this distinction and limits the full protective scope of Charter rights to where the government itself relies on its laws, at least with respect to common law rules.

### III. A REVISED SPECTRUM OF POSITIONS ON THE SCOPE OF CONSTITUTIONAL RIGHTS

We are now in a position to clarify and revise the theoretical spectrum on the possible scope of constitutional rights. In a sense, I will be making explicit the analytical shortcomings of the existing spectrum that have formed a subtext of the previous analysis.

As we have seen, the United States, Canadian, and German positions are each compatible with the vertical approach that constitutional rights bind only the government. Yet, in each, these rights have significant impact on private actors, albeit a structurally lesser one in Canada. This obviously suggests that the vertical approach itself does not specify the full reach of constitutional rights into the private sphere. In other words, there is not a single vertical position but several, some of which are more "horizontal" than others.

In addition to the basic question of who is subject to constitutional duties, there are three separate and independent issues that, in combination, determine the full — direct and indirect — scope of rights. First, which laws are subject to constitutional rights claims (public law, private law, enacted law, common law), and how (directly or indirectly)? Second, in which types of litigation may a party claim that a law violates constitutional rights: litigation between an individual and the state only or also litigation between private actors where at least one of them invokes or relies on such a law? Third, do the duties placed on the government by individual rights provisions include positive ones to promote constitutional values? If so, private actors may well be the objects of such constitutionally required regulation.

All permutations of these three additional issues are perfectly compatible with the basic vertical constraint, and yet they result in greater or lesser degrees of indirect horizontality. Accordingly, although the distinction between vertical and horizontal effect — who is bound by the Constitution — is a useful one in terms of anchoring and distinguishing the polar horizontal position, it does not carve out or distinguish a single opposite vertical one. The proposition that constitutional duties apply only to the state is by itself too blunt — that is, consistent with too many relevantly distinct positions on the scope of constitutional rights — to be useful without more. If the vertical approach as a whole attempts to draw a line between the public and private, there are a range of different positions consistent with its basic constraint, each of which draws the boundaries of the public and private spheres in subtly, but importantly, different ways.

The failure to see that these various dimensions of scope are separate and independent — that imposing duties on the state alone does not determine whether constitutional rights affect legal relations between private actors, and that this latter issue does not dictate the role of constitutional rights in purely private litigation — is responsible for much of the characteristic vagueness and ambiguity in the literature about vertical and horizontal effect. In presenting his account, for example, Hunt tends to switch from one of these issues to another, employing them essentially interchangeably as statements — or alternative formulations — of the differences between the two polar positions.<sup>190</sup> In fact, the various possible answers to the independent issues create several distinct positions between the two poles on the vertical-horizontal spectrum.

Specifically, there are (at least) three vertical positions and not one, each varying in its degree of horizontality and corresponding to different permutations of answers to the first and second issues. These three may be termed “strong vertical effect,” “weak indirect horizontal effect” and “strong indirect horizontal effect.”<sup>191</sup> Once again, all three abide by the basic notion that private actors are not subject to constitutional duties, which is why this notion is essentially useless for identifying which of the variations a particular system adopts: it radically underdetermines the true scope of constitutional rights

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190. See Hunt, *supra* note 9, at 424-26. Thus, Hunt appears to restate the horizontal position to involve constitutional duties on private actors, to regulate legal relations between private actors, and to render constitutional rights relevant in “purely private litigation” without acknowledging that these are three different issues involving different degrees of horizontality. See *id.*

191. As reported above, *supra* note 118, Phillipson uses the terms “weak” and “strong indirect horizontal effect” to distinguish the Canadian and (as he sees it) German position from the position suggested by Justice Krieger in *DuPlessis*. He also argues contra Hunt that the weaker version is the better interpretation of the UK’s position under the Human Rights Act. See Phillipson, *supra* note 61, at 830-31.

The vertical pole of the spectrum is now characterized not by the absence of constitutional duties on individuals, but the absence of *any* horizontal effect, direct or indirect, of constitutional rights. Accordingly, the polar position of "strong vertical effect" means that constitutional rights apply only to public and not to private law; that is, they regulate legal relations between the state and the individual (such as criminal, administrative, and tax laws), but not legal relations between private individuals.<sup>192</sup> It would also be consistent with this position for constitutional rights to apply to (some or all) private law but only in litigation in which one party is the state and the other is a private actor. This would permit an individual to challenge as unconstitutional a provision of private law that arises in a suit between them, for example a provision of property or employment law where the government is a landlord or employer. In such situations, constitutional rights protect only where the government itself is relying on its laws to burden the individual. Under both scenarios, constitutional rights have no horizontal effect at all, direct or indirect.

Moving away from this pole, "weak indirect horizontal effect" means that (at least some type of) private law is only indirectly subject to constitutional rights and not directly governed or controlled by it. Typically, this indirect impact on private law occurs via the power or duty of the courts to take constitutional values into account in interpreting, applying, and developing this law in line with constitutional values. Constitutional values, if not rights, may nonetheless be asserted in litigation between private actors, unlike the strongly vertical position. Overall, this means that the individual's constitutional rights are only partially (or indirectly) protected where another individual relies on a private law rule to burden him or her.

By contrast, moving further away from the vertical pole, the next position of "strong indirect horizontal effect" means that all law, including all private law, is directly subject to constitutional rights and may be challenged in private litigation. This in turn means that constitutional rights fully protect the individual whether it is the government or another individual which seeks to rely on an unconstitutional law.

Superimposed on these three positions is the distinct issue of positive governmental duties, which may indirectly subject private actors to fundamental rights in a different way: not through litigation but constitutionally required governmental regulation.<sup>193</sup>

Finally, now all the way at the other pole, direct horizontal effect means that constitutional rights do not protect only against *laws* (and

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192. If it is not inherently the case that public laws may only be challenged in the context of public litigation (i.e., an individual versus the state), then the polar position may be further refined to include this requirement.

193. See *supra* note 10.

other actions of, or attributable to, the government) but subject all *actions* to constitutional review, regardless of who performs them or whether the private actor performing the action is relying on a law to do so.

Of course, the fact that either all actions or all laws are subject to a constitution does not remotely mean that all actions or laws violate it. This quite separate issue depends on the substantive content of the rights granted by the given constitution. Having completed my analysis of the structural issue of scope, I now turn for the remainder of this Article to what the U.S. Constitution and the constitutions of Canada and Germany, in particular, have to say on this substantive issue regarding certain specific types of laws regulating private conduct.

#### IV. WHICH LAWS REGULATING RELATIONS BETWEEN PRIVATE ACTORS ARE UNCONSTITUTIONAL?

##### *A. General Considerations*

The previous sections of this Article have attempted to establish the basic structural proposition that in the United States all laws are directly, fully, and equally subject to the Constitution. This is the position I have referred to as strong indirect horizontal effect. Under the Supremacy Clause, no subset of laws is immune from constitutional review because of failing some threshold test of state action. Laws are subject to the Constitution not because they (do or do not) amount to state action under the Fourteenth Amendment but because the Supremacy Clause says they are. Every state constitutional provision, statute, and common law rule is equally and fully subject to the Constitution, regardless of whether it (a) regulates public or private actors, (b) regulates relations between individuals and the state or relations between individuals, (c) mandates or permits private action, or (d) is at issue in public or private litigation. This position belies the general understanding of the United States as exempting the private sphere from the reach of constitutional rights. It does not mean that constitutional duties are imposed on private actors. Rather, because such duties govern the laws that regulate their relations with each other, the Constitution indirectly affects them, sometimes adversely, by placing limits on their interests, preferences, and actions that can be protected by law. If, for example, the Constitution prohibits laws making racially restrictive covenants valid contracts, then private individuals otherwise wishing to enter or enforce them are indirectly regulated by the Constitution.

That all laws are subject to constitutional review does not, of course, tell us whether any particular law passes or fails such review. It fails if and only if it conflicts with a substantive provision of the Constitution. But the previous work means that, at a minimum, the

First Amendment (as interpreted to apply to the states) and the Fourteenth, read in conjunction with the Supremacy Clause, mean that no state *law* shall do any of the things prohibited in these provisions. With respect to substantive review, precisely the same constitutional tests apply to laws regulating relations between private actors as apply to any other type of law or government action. Thus, if all laws are subject to constitutional review, they are in addition subject in the very same way. In applying these tests to determine the actual and potential impact of constitutional rights on private actors, I will focus on two paradigmatic types of private laws: laws regulating speech between private actors,<sup>194</sup> and laws regulating private race and sex discrimination. Under both categories, the general constitutional tests of the First and Fourteenth Amendment apply to limit what private actors can be required, encouraged, or permitted to do by law.

Before starting this analysis, it is important to dispel the confusion, attributable to the state action doctrine, which suggests that certain distinctions are relevant for substantive constitutional analysis. First, at least with respect to equal protection, whether a law regulates public or private actors is irrelevant to the substance of the applicable constitutional review.<sup>195</sup> Thus, in the cases of *Plessy v. Ferguson*<sup>196</sup> and *Brown v. Board of Education*,<sup>197</sup> no one to the best of my knowledge has ever suggested that different constitutional tests apply because in the first, the state was regulating the conduct of *private* actors (requiring private railroads to practice racial segregation) and in the second, the state was regulating *public* actors (requiring public elementary schools to segregate).<sup>198</sup> Both are clearly subject to the same constitutional test under the Equal Protection Clause, and both equally clearly fail it.

Second, the same constitutional test applies whether the law in question is mandatory or permissive. As we have seen, this issue is standardly taken to be important, even conclusive, with respect to the

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194. Although not a recognized or perhaps even well-definable category of free speech, it is a subset of laws regulating private speakers (as distinct from governmental ones). The subset covers situations in which the law regulates what one private individual may express to or about another (such as defamation, boycotts, or in the employment context).

195. It is, however, relevant under the First Amendment whether the government is regulating its own speech (and in the case of the federal government that of nonfederal government actors), or that of private actors.

196. 163 U.S. 537 (1896).

197. 347 U.S. 483 (1954).

198. This distinction between regulating public and private actors does not track that between "social" and "political" equality employed by the Court to justify its decision in *Plessy*, even if (as seems highly unlikely) this latter distinction remains as constitutionally relevant.

(false) threshold issue of state action.<sup>199</sup> I have argued above that this distinction should play no role whatsoever in determining whether a law is subject to constitutional review on the merits in the first place, since both mandatory and permissive laws are laws of the state. It is equally irrelevant, however, with respect to the substantive standard to be applied: both mandatory and permissive laws are subject to the same constitutional test, and both may violate it. Thus, a state law expressly *permitting* racial segregation in public schools is undoubtedly unconstitutional under the Equal Protection Clause just as the state law *requiring* such segregation invalidated in *Brown*. And just as the overruled decision in *Plessy* concerned a state law requiring racial segregation by private railroad corporations, a state law expressly permitting private railroads to segregate on the basis of race would undoubtedly also be unconstitutional. In all four cases (public and private actors, mandatory and permissive laws), the laws are subject to the same constitutional test: they are race-conscious and are therefore subject to strict scrutiny. By contrast, a law that on its face is race-neutral but has the effect of creating or promoting racial segregation will be subject to strict scrutiny only if such result was the intended effect of the law, regardless of whether the law is mandatory or permissive, or whether it applies to public or private actors.<sup>200</sup>

This is emphatically not to say, however, that the *application* of this same test will necessarily result in identical outcomes for mandatory and permissive laws. Indeed, as I will demonstrate below, some of the hardest substantive questions in all of constitutional law concern the extent to which state laws may permit private actors to do what the government itself clearly cannot. By contrast, mandatory or coercive laws of this sort generally represent easy constitutional questions.

In the next Section, I will explain how the single test of free speech and equal protection applies to a series of concrete cases and hypotheticals raising the issue of the indirect effect of constitutional norms on private actors. In the final Section of this Part, I shall explain how this impact under existing case law could be vastly expanded by a much-debated change in the interpretation of the relevant constitutional provisions.

### B. *The Impact of Specific Constitutional Rights on Private Actors*

Let us see how current doctrine applies to some of the thorniest cases and hypotheticals involving laws regulating private actors, and whether their resolution in the United States under the strong form of

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199. Chief Justice Rehnquist expressed this view when, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978), he claimed that laws merely acquiescing in private conduct do not constitute state action.

200. *Washington v. Davis*, 426 U.S. 229 (1976).

indirect horizontal effect differs in particular from that in Germany, which also adopts this position, and Canada, which employs the weaker form. This comparison will also perhaps suggest whether the structural issue of the general scope of constitutional norms, or the substantive issue of their content, appears to make the greater difference in terms of actual impact on private actors. I begin with a range of free speech issues and then turn to equal protection in the context of private race and sex discrimination.

### 1. *Free Speech*

The issue of defamation has been a leading vehicle for courts to address the issue of indirect horizontal effect not only in the United States but also in Germany, Canada, and South Africa. In *New York Times v. Sullivan*, the direct application of the Constitution to the common law rule at issue in this private litigation meant that the state libel law was deemed a content regulation of protected speech and thus subject to strict scrutiny, although the Court did not explicitly apply this now-standard test.<sup>201</sup> With respect to public officials like Sullivan, albeit suing in his private capacity, the compelling governmental interest was effectively limited to protecting reputation only against actual malice. With respect to other individuals, this governmental interest is broader and traditional defamation laws may be "necessary" to protect it.<sup>202</sup> Accordingly, although public officials are not bound by the Constitution in their private capacity, the Constitution significantly constrains the legal protection their reputations can be given.

In the Canadian case of *Hill v. Church of Scientology of Toronto*,<sup>203</sup> decided in 1995, the relevant facts were identical to those in *New York Times*. A public official brought suit in his private capacity under the common law of defamation against those he alleged to have libeled him concerning actions performed in the course of his employment.<sup>204</sup>

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201. The Court implicitly balanced the competing claims in crafting the constitutional rule of actual malice. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964). As the Court wrote:

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision.

*Id.*

202. In subsequent cases, the "actual-malice" test was extended from "public officials" to all "public figures," a much broader category. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

203. [1995] 2 S.C.R. 1130. See *supra* notes 50-54 on indirect horizontal effect.

204. The fuller facts of *Hill* were that the plaintiff, a Crown attorney, sued the defendants for statements contained in a press conference on the steps of Osgoode Hall, Toronto. The statements were made in connection with the defendant's commencement of

Affirming, and refining, the distinction set out in *Dolphin Delivery*,<sup>205</sup> the Canadian Supreme Court held that although Charter rights (here, the Church's free speech rights) did not apply to the common law at issue in private litigation, the common law must be interpreted and developed in line with Charter values as part of the inherent jurisdiction of the courts to modify or extend the common law in line with evolving social norms.<sup>206</sup>

The result of this indirect application, however, was that the existing common law of defamation was held to be consistent with Charter values as it struck an appropriate balance between the competing values of reputation and freedom of expression. After lengthy consideration of varying critiques of the rule in *New York Times*, including Justice Byron White's subsequently stated view that it created perverse incentives for "polluting" public affairs with false information and undervaluing reputation,<sup>207</sup> the court concluded that its actual malice test, as sought by the defendants, should not be adopted. The court left little doubt, however, that its rejection of *New York Times* was not due to the Charter's lesser impact on the common law than on statute or executive action. The court would almost certainly have rejected the actual malice test under the direct application of Charter rights, for "the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States."<sup>208</sup>

In the two leading German libel cases of *Mephisto*<sup>209</sup> and *Böll*,<sup>210</sup> the plaintiffs were each public figures though not public officials (who in the United States would fall within the subsequent extension of *New York Times*)<sup>211</sup>: the estate of Nazi-era actor, Gustaf Grundgens and the Nobel Prize-winning novelist Heinrich Böll. In both cases, the FCC held that the "influence" of the Basic Law's objective order of values on the private law of libel required a balancing of the two competing values of (a) reputation/personality, protected under both

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criminal contempt proceedings against the plaintiff, alleging that the plaintiff had misled a judge and breached orders sealing documents. At the contempt proceedings, the allegations against the plaintiff were found to be untrue and without foundation.

205. *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. See *supra* notes 45-50 and accompanying text (discussing *Dolphin Delivery*).

206. *Hill*, [1995] 2 S.C.R. at 1170-72.

207. The Canadian Supreme Court quotes *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767-69 (1985) (White, J., concurring). *Id.* at 1183-85.

208. *Id.* at 1186 (quoting the Australian High Court decision *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104, 136).

209. BVerfGE 30, 173.

210. BVerfGE 54, 208.

211. See *supra* note 201.



the Civil Code and under Article 2 of the Basic Law,<sup>212</sup> and (b) freedom of expression, protected under Article 5. And, as in *Hill*, the FCC struck the balance in favor of reputation/personality in both cases.

Again as in *Hill*, there is nothing in the FCC's opinions to suggest that the structural issue of scope played any role in its rejection of the free speech claims. Rather, the outcome appears to reflect differences in the substantive content of free speech rights. In both Canada and Germany, the protection of reputation is afforded greater weight in the balance with free speech than in the United States.<sup>213</sup> In more recent cases, the FCC has somewhat recalibrated the relative weights of free expression and reputation in favor of the former, but still not to the extent required for acceptance of the actual malice rule.<sup>214</sup>

*Du Plessis* also involved a common law defamation suit, by a private actor against a newspaper.<sup>215</sup> As we have seen, the South African Constitutional Court used this case as a vehicle to determine the issue of the vertical-horizontal scope of the bill of rights contained in the Interim Constitution of 1993, opting for an approach similar to Canada's. The court held the rights did not directly apply to common law involved in private litigation but affirmed the duty of the other courts to develop the common law in light of the bill of rights. Yet, it held that "the application and development of the common law" was not a matter within its jurisdiction under Section 98, but that of the ordinary courts, so that it did not apply the indirect approach to the facts of the case.<sup>216</sup>

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212. GG Art. 2 Nr. 1 ("Everyone has the right to the free development of his or her personality insofar as he or she does not violate the rights of others or offend against the constitutional order or the moral law.").

213. The German Constitutional Court in *Böll* strongly suggested that the author's constitutional right to personality was violated by the defendant newspaper commentator, a suggestion that appears to place constitutional duties on private actors and so comes closer to direct horizontal effect than the *Lüth* formula. For discussion of a similar suggestion in another German case, see *infra* notes 221-222 and accompanying text.

Although formally the courts in both Canada and Germany ascribe constitutional status in defamation cases to the competing privacy/reputational claims of the plaintiff, whereas in the United States this claim would simply be a state interest to be asserted against the defendant's constitutional right to free speech, this difference in itself does not account for the different outcomes. In the United States, the same status would attach to the competing claims in the context of a libel action brought by a nonpublic figure and here the Court would permit the state interest, expressed in its libel law, to trump the free-speech claim of the defendant.

214. See the "Stern-Strauss Interview" Case, BVerfGE 82, 272 and the two "Soldiers Are Murderers" Cases, 45 Neue Juristische Wochenschrift [NJW] 2943 (1994) and 22 Europäische Grundrechte Zeitschrift [EuGRZ] 443 (1995), in which the Court upheld free-speech claims against private law defamation and criminal defamation claims respectively. See EBERLE, *supra* note 16, at 209-20.

215. *Du Plessis v. De Klerk*, 1996 (3) SA 850 (CC). This case is discussed *supra* notes 73-77 and accompanying text.

216. *DuPlessis*, 1996 (3) SA at 876.

A second type of free speech case illustrating indirect horizontal effect involves the extent to which laws protecting private actors from economic loss caused by organized campaigns against them (such as boycotts and picketing) are limited by the constitutional free speech rights of those campaigning. In *Claiborne Hardware*,<sup>217</sup> the Supreme Court struck down on First Amendment grounds the state conspiracy law under which the plaintiff recovered damages for economic loss caused by the NAACP boycott of segregated shops. The Supreme Court held that the boycott was not essentially economic in nature but rather was protected political expression, which accordingly limits the ability of states to impose civil liability.<sup>218</sup> Again, while not directly subjecting the shop owners, but the state law, to the First Amendment, the Constitution nevertheless clearly affected the shop owners in a very tangible way, making it difficult — if not impossible — to obtain legal protection of their economic interests.

In Germany, the *Lüth* court's analysis was essentially the same.<sup>219</sup> Lüth's Article 5 free speech rights protecting his political expression in organizing a boycott of Harlan's films were found to outweigh Harlan's purely economic interests protected by the private law.<sup>220</sup> A more complex case is *Blinkfuer*,<sup>221</sup> in which the FCC held that the boycott in question was coercive in nature and consequently fell outside the protection of Article 5 altogether. The boycott was organized by the powerful Springer newspaper group against news dealers selling a small, left-wing magazine that published East German television schedules.<sup>222</sup> The complexity stems from the FCC's holding that the magazine's freedom of expression was at issue and that the state had a positive duty to protect it against such coercion, requiring the lower court to award damages against Springer. It even suggested that Springer had violated the magazine's constitutional right to publish the information and that the courts must recognize a constitutional cause of action against such a violation. These latter two suggestions appear to cross the analytically clear line between indirect and direct horizontal effect.<sup>223</sup>

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217. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

218. *But cf. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982) (holding that secondary boycotts were not protected, even if motivated by political rather than economic purposes).

219. Lüth, BVerfGE 7, 198 (205); *see also supra* notes 71-80 and accompanying text (discussing this case).

220. *See supra* note 75-76 and accompanying text.

221. BVerfGE 25, 256.

222. *Id.*

223. *See Quint, supra* note 62, at 275-81. *But cf. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 189 (1994) (acknowledging that in *Blinkfuer* "at two points the Court even appeared to embrace [this] far more radical proposition . . . [but] in light of a number of analogous decisions, it seems more likely [that the Court read] Article

In the admittedly different context of secondary picketing in the Canadian case of *Dolphin Delivery*,<sup>224</sup> the defendant union argued (analogously to the NAACP and Lüth) that the plaintiff corporation's reliance on the common law of inducing breach of contract violated the union's Charter guarantee of free expression. As we have seen, the Supreme Court determined that this Charter right does not apply to common law private litigation and thus dismissed the appeal against the lower court's injunction. The court did not bother to apply the indirect analysis as to whether this common law tort was consistent with Charter values, having already stated in dicta that even supposing the Charter applied directly to the case, the limitation of free speech rights would have been justified under Section 1 of the Charter.<sup>225</sup> As with *Hill*, this again suggests there may often be little real difference in outcome under the two modes of analysis.

A third important type of free speech case involves the firing of employees for their political views or for actions expressing those views. This appears to raise a paradigmatic instance of vertical versus horizontal effect: Is an employer bound by the constitutional free speech rights of its employees? The conventional answer for all countries rejecting direct horizontal effect is in the negative. Free speech rights are held against the government and impose no constitutional duties on private employers. And yet, the doctrine of indirect horizontal effect is relevant wherever an employer relies on law to exercise a right to fire, which is to say practically always.

In a situation where a printing employee was fired for refusing to print material which, in his view, glorified war, the Federal Labor Court held that the constitutional values of freedom of speech and conscience must have some influence on, and be balanced against, the private law value of employer autonomy, and decided the balance in favor of the employee.<sup>226</sup> To be sure, the private law of employment was not employment at will, as generally in the United States, but

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5 (1) . . . to impose an affirmative duty on the state to protect the press against third parties").

224. *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. This case is discussed *supra* notes 44-49 and accompanying text. There are two major differences in context. First, secondary picketing is less likely to be considered protected political expression than the boycotts in *Claiborne* and *Lüth*. Second, secondary picketing may well be less favorably treated for free-speech purposes than primary picketing. As noted above, *see supra* note 217, the U.S. Supreme Court has held that secondary boycotts are unprotected speech, even if political in purpose.

225. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1 ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

226. *BAGE* 47, 363. This case is discussed *supra* notes 84-85 and accompanying text.

termination for cause.<sup>227</sup> In this legal context, the court held that the governing unfair dismissal statute must be applied to preclude such an act of conscience from amounting to a “socially justified” cause of dismissal.<sup>228</sup>

In the United States, as in Germany, the relevant employment law relied on by an employer is directly and fully subject to the Constitution, assuming a plaintiff employee sues under an available nonconstitutional cause of action, such as breach of contract.<sup>229</sup> Most likely the employment law invoked in the employer’s defense will be the typical common law or statutory rule of employment at will. The basic analysis under the Court’s current First Amendment jurisprudence would probably be that, unlike state libel and conspiracy laws, employment at will is a nonspeech regulation with only incidental burdens on freedom of expression. Although the law authorizes the firing of an employee for any reason, including political views or positions, the firing is not targeted at speech and thus receives no form of special scrutiny.

On the other hand, a state law that explicitly permitted an employer to fire an employee for political views, or for holding or voicing certain political views, would likely be analyzed differently, as a law targeting speech, and would almost certainly be unconstitutional. This would be equally true in the context of a law permitting firing only for cause, where political views were specified as one of the permissible causes. Imagine a cold-war era law stating that employers can fire anyone expressing sympathy for communism. Thus, two laws (one speech neutral and the other non-neutral), both permitting employers to fire for political views, may have different constitutional outcomes.<sup>230</sup> The constitutional value of free speech in the United States is expressed by presumptively forbidding laws relied on in private litigation, including employment laws, to target it; in Germany the value is protected also against laws imposing incidental burdens. This difference is one in the content of the free speech right, not in horizontal effect or the scope of constitutional norms. Were the Court to expand the substantive scope of free speech in the United States to protect against incidental burdens imposed by general laws, this would

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227. See *supra* note 85 (discussing the Unfair Dismissal Protection Act, 1969 (*Kündigungsschutzgesetz*) which renders termination with notice legally effective only if it is “socially justified”).

228. For the statutory list of “socially justified” reasons for dismissal, see *supra* note 85.

229. Of course, in practice, given the likely outcome of the substantive review described in the next sentence, such a plaintiff is unlikely to have the incentive to be forthcoming. But this does not affect the analysis.

230. This is an example of the general feature of constitutional rights as rights against specific governmental rules and not general immunities to act. See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

directly impact employment law and the permissible grounds on which employers could exercise the right to fire.

In sum, the constitutional right to free speech in the United States has a greater regulative impact on private actors in the realm of defamation than it does in both Germany and Canada and perhaps also in the realm of boycotts and picketing than in Canada. Formally, these differences do not appear to stem from the difference between direct and indirect application of this constitutional right to private law, but rather from differences in the substantive content of free speech. In the United States, greater weight is given to the substantive right in the balance with competing interests. Whether, ultimately, the relatively lesser subjection of common law to constitutional norms in Canada under weak indirect horizontal effect explains the greater substantive weight afforded certain traditional private law values (such as reputation) is a fascinating but very difficult question. In the realm of employment law, by contrast, free speech rights in the United States have lesser impact on private actors than in Germany, despite strong indirect horizontal effect in both. Again, this is due to the substantive difference that in Germany, but not in the United States, these rights are deemed to be implicated when general laws incidentally burden them.<sup>231</sup>

## 2. *Equal Protection*

Turning from the First Amendment to the Equal Protection Clause, a famously problematic area is race and sex discrimination in the context of private choices that are enforceable by law, such as contracts, testamentary dispositions, and the exercise of property rights. Once again, this appears to involve a paradigmatic instance of vertical effect: private individuals have no constitutional duty to refrain from race or sex discrimination in choosing what contracts to enter into and with whom, or in disposing of their property, or against whom to assert and exercise property rights. And once again, this point, though certainly true, does not address the separate question of the extent to which the Constitution impacts private actors by regulating the laws on which they may rely in these areas. This is, of

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231. The same difference exists between the two countries in the area of free exercise of religion, as a result of the U.S. Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The German Constitutional Court has held in several cases that, under Article 4(2) of the Basic Law ("The undisturbed practice of religion is guaranteed."), religious individuals and institutions are entitled to special exemptions from generally applicable laws burdening religious freedom and not only from laws targeting it. See, e.g., Rumpelkammer, BVerfGE 24, 236 (finding a Catholic youth organization entitled to exemption from "unethical competition" law); "Blood Transfusion" Case, BVerfGE 32, 98 (setting aside the conviction of a husband who, on religious grounds, had refused to urge his dying wife to submit to a blood transfusion).

course, the easy question: all such laws, like any other, are subject to the Constitution. The more difficult one is which laws violate it.

As a very general proposition of constitutional law under current doctrine, a state may, through its laws, permit private actors to do what it itself cannot. This general proposition is the result of the interaction of the state action doctrine and a second traditional axiom of American constitutional law: in the area of individual rights, the constitutional duties exclusively placed on government actors are negative and not positive.<sup>232</sup> Thus, as is well known, the Constitution has been held to neither itself protect individuals from deprivation of life, liberty, or property by other individuals (state action doctrine),<sup>233</sup> nor to require the state to do so (no positive duties). If the state's only constitutional duty is the negative one of not itself depriving individuals of their constitutional rights, laws protecting against murder by nonstate actors are, formally speaking, discretionary. Moreover, if the state has no constitutional duty to prohibit murder or private "takings" or deprivations of property, it also has no constitutional duty not to permit them and accordingly may do so.<sup>234</sup> Thus, for example, it would seem that other things being equal, a state may permit private individuals to deprive another person of property without due process of law (this is the substantive issue the Court avoided reaching in *Flagg Brothers* because of its state action holding). As I have mentioned above, the existence of positive duties on the state is a second way in which constitutional rights may have indirect

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232. See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (holding that state officials are not constitutionally obligated to protect members of the public at large from crime); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("The Constitution is a charter of negative liberties; it tells the state to let people alone . . ."); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (comparing U.S. and German positions on positive rights). But cf. Karst & Horowitz, *supra* note 10 (arguing that the Court has implicitly acknowledged that the Equal Protection Clause imposes an affirmative duty to prohibit private racial discrimination in areas such as voting and urban housing); David Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229 (2002).

Outside the area of individual rights, however, this is clearly not true. The Constitution imposes positive duties on Congress to "assemble at least once in every Year," U.S. CONST. art. I, § 4, cl. 2, and on the President to "from time to time give to the Congress Information of the State of the Union . . . [and] take Care that the Laws be faithfully executed, U.S. CONST. art. II, § 3.

233. See *DeShaney*, 489 U.S. 189 (1989).

234. Of course, under the case or controversy requirement, Supreme Court precedent for such propositions is typically lacking because of the almost complete absence of laws of this sort in practice. Although similar limitations may also arise under constitutional systems lacking the case or controversy requirement of U.S.-style "concrete" judicial review. Even the leading alternative form of judicial review, namely "abstract" judicial review (in which enactments are challengeable only by certain specified political actors), still only assesses the constitutionality of laws actually enacted. See, e.g., MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1979) (describing the difference between "abstract" and "concrete" judicial review); Gardbaum, *supra* note 2, at 717-18 (same).

effect on private actors that is perfectly consistent with the basic vertical position.<sup>235</sup>

Although, then, as a general proposition under current constitutional interpretations, states may permit private actors to do what they themselves cannot, this certainly does not mean that all forms of such permission are constitutionally legitimate. Returning specifically to the issue of racially discriminatory private choices, the Court's current equal protection doctrine makes the constitutionality of any law permitting or enforcing such choices turn on whether facially it is (a) race-conscious or (b) race-neutral with effects on racial minorities that cannot be said to be intentional.<sup>236</sup> Since ordinary contract, testamentary, and property laws — whether statutory or common law — are typically race-neutral on their face and are not consciously designed or intended to have any disproportionately burdensome effect that they might have in fact on racial minorities as a result of private and structural discrimination, they will normally pass constitutional muster and do not amount to a violation by the government of the Equal Protection Clause.

If such laws therefore permit private actors to employ the coercive power of the state to execute their racially discriminatory choices, the reason they survive constitutional review is neither because such court orders or permissive laws do not amount to state action in the first place (it is the law itself, and any law, that triggers the Constitution) nor because on the merits permissive private laws automatically pass constitutional muster. In contrast, a law *expressly* permitting private actors to practice racial discrimination in contracts, wills, or the assertion of property rights would almost certainly be unconstitutional as violating the current majority's color-blind norm.<sup>237</sup> And any law mandating rather than permitting private racial discrimination in these areas would necessarily be race-conscious, as in *Plessy*.

Although for this reason typical race-neutral private laws will generally be upheld under current doctrine, I want to suggest that the distinction between facial and as-applied constitutional challenges, though generally unfamiliar in the equal protection context,<sup>238</sup> is

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235. See *supra* note 10.

236. The critical nature of this distinction dates from *Washington v. Davis*, 426 U.S. 229 (1976).

237. In *Evans v. Newton*, 382 U.S. 296 (1966), a subsequently repealed state statute expressly permitting testators to include racial restrictions in their wills was one factor in the Court's holding that a city could not continue to operate a park — left to it under such a will — on a racially discriminatory basis. The Court suggested that such a statute would be unconstitutional.

238. See Adler, *supra* note 230, at 37 n.144 ("As-applied challenges virtually never arise under the Equal Protection Clause. For the exception that proves the rule, see *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-51 (1985)."). In *Cleburne*, without deciding the facial validity of a city ordinance requiring a special-use permit for the

potentially relevant here. Some facially race-neutral laws will have unconstitutional applications in particular circumstances because they inherently involve the state in impermissible race-conscious conduct. Thus, a general common law rule making all validly entered contracts legally enforceable is likely to be constitutionally unproblematic notwithstanding racially disparate impact. Where this general rule is applied in the specific context of racially restrictive covenants, however, the relevant issue is not disparate effects of this law but that such application necessarily requires an enforcing court to engage in race-conscious conduct insofar as one of the facts the plaintiff must prove is the race of the willing purchaser. Such unconstitutional application would be quite distinct from independent, racially discriminatory enforcement of the law by a court, for example, where it enforces restrictive covenants against some but not other racial groups. It is the very point of the underlying law that contracts are legally enforceable, and yet some particular applications of this facially race-neutral law require race-conscious conduct by a court. Arguably, such applications are presumptively unconstitutional as violating the current color-blind norm.

This principle would also be relevant to certain specific applications of race-neutral state testamentary law but not others. It would be relevant, for example, to court enforcement of a will leaving property to "my white children," where the testator had children with white and Native American wives.<sup>239</sup> By contrast, where (facially race-neutral) property law is applied in the context of a homeowner seeking to eject someone on racially discriminatory grounds, an enforcing court is not inherently required to determine or take into account the race of the ejected person, which is not part of the reason for its order.

Application of this entire analysis to *Shelley v. Kramer* confirms the difficulty of the substantive, equal protection issue in the case. As discussed above, the state law invoked by the plaintiff is directly subject to the Constitution in the first place. Under current doctrine, at least as standardly conceived, the constitutionality of the state law would likely depend on how it is characterized. If the law invoked by the plaintiff was that all validly entered contracts, or all restrictive covenants on land, are legally enforceable, this would be a facially race-neutral law which, notwithstanding any disparate racial impact,

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construction of hospitals for, inter alia, the feeble minded, the Court held unconstitutional the ordinance's application to a home for the mentally retarded.

239. But this principle would not be relevant to enforcement of all wills with a racial element. Thus, in *Evans v. Abney*, 396 U.S. 435 (1970), the follow-up case to *Evans v. Newton*, 382 U.S. 296 (1966), the Supreme Court upheld the state court's determination that under the relevant (race-neutral) state law, the trust should be deemed to have failed and the city park must revert to the testator's heirs, rather than order racial integration of the park. Absent proof of independent racial animus by the court, application of the state law in this context did not inherently require race-conscious conduct on its part.



would not attract strict scrutiny unless discriminatory intent or discriminatory application were shown.

If, on the other hand, the law was that racially restrictive covenants are enforceable contracts as an exception to the general public policy rule favoring free alienability of land, then no less than the "equal impact" antimiscegenation statute struck down in *Loving v. Virginia*,<sup>240</sup> this is a race-conscious law making strict scrutiny the appropriate substantive standard. As several have suggested, there is strong evidence that this was the case in *Shelley*.<sup>241</sup> Moreover, *Shelley* itself predated the rigid modern rule of *Washington v. Davis*<sup>242</sup> for race-neutral laws and, as in *Reitman* to be discussed in the next Section, the Court may well have been influenced by the obvious disparate effects of the law.

Even under the race-neutral version of the law and the modern test, however, as I suggested above, there may be the basis for an as-applied challenge. Application of the general law of contracts to the specific context of racially restrictive covenants involves inherently race-conscious conduct on the state's part in a way that, for example, enforcing trespass laws on behalf of a racially prejudiced landowner does not. This is because proof of race is necessary in the former but not the latter. For similar reasons, wouldn't the Equal Protection Clause forbid a state from applying its general rules of offer, acceptance, and consideration to slave contracts absent the Thirteenth Amendment? Once again, apart from the underlying law itself, a state court order might be independently unconstitutional if it in fact enforces the law in a blatantly discriminatory way, such as never enforcing other types of restrictive covenants or racial covenants against certain groups.

In sum, although very generally speaking a state may permit private actors to do what it cannot, any particular permissive law is still subject to the same constitutional test as all other laws and may fail it. Thus, implied or "residual" permission resulting from the absence of any law prohibiting an action, as well as express permission to act cast in race-neutral terms, will typically pass constitutional muster race-conscious permissive laws will not.<sup>243</sup>

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240. 388 U.S. 1 (1967).

241. See, e.g., *TRIBE*, *supra* note 141, at 260, *quoted in supra* text accompanying note 153.

242. 426 U.S. 229 (1976).

243. Obviously there is a great deal more that could be said on the merits of these difficult substantive issues. My aim here is simply to describe the likely outcomes applying existing doctrine. Since few of these types of cases have been considered in recent years, it is of course quite possible that the application of current doctrine would result in different outcomes than those I suggest. It is also possible that current doctrine might be changed in order to answer them.

In between laws permitting and mandating private racial discrimination are those that may be said to encourage or endorse it. Do such laws violate equal protection? Of course, once again, the nonissue here is whether such laws are subject to the Constitution in the first place, as was explicitly recognized by all members of the divided Court in *Reitman v. Mulkey*.<sup>244</sup> On the substantive issue of constitutionality, Justice Harlan's dissent in *Reitman* answered the question in the negative by relying in effect on a permission/coercion dichotomy for equal protection purposes: "A state enactment, particularly one that is simply permissive of private decision-making rather than coercive . . . should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect."<sup>245</sup> By contrast, the majority applied a stricter test invalidating laws that fall between permission and coercion. According to the majority, it may be one thing for a state not to prohibit private discrimination in the first place, but it is quite another for a state to repeal by constitutional amendment its existing laws outlawing such discrimination.<sup>246</sup> In so doing, the state was not merely taking a neutral position on the issue but in context was actively encouraging and authorizing a culture of private racial discrimination; in short, the state was itself discriminating.<sup>247</sup>

As the reasons for the split on the Court indicate, the substantive constitutional question (unlike any threshold issue) in *Reitman* was a difficult and close one. It has not specifically been addressed or reconsidered since then, although the disagreement in *Reitman* can perhaps be considered duplicated in the different context of the Establishment Clause of the First Amendment.<sup>248</sup> Thus, several members of the Court subscribe to the position that the states are prohibited from "endorsing" religion, which involves something more than taking a neutral permissive posture but less than a coercive one,

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244. 387 U.S. 369 (1967).

245. *Reitman*, 387 U.S. at 391 (Harlan, J., dissenting). Note that Harlan expressly disagrees with Rehnquist's view in *Flagg Brothers* that such permissive laws do not amount to "state action."

246. For Justice Harlan, this was a distinction without a difference: repeal by constitutional amendment no more violated equal protection than a failure to pass any antidiscrimination laws in the first place. If a state is not constitutionally required to outlaw private discrimination in the first place, it may equally repeal any of its laws that do. *Id.* at 394 (Harlan, J., dissenting).

247. As Karst & Horowitz point out, *supra* note 10, the majority opinion was particularly incoherent in setting out its reasoning in support of this proposition, attempting to defer to a nonexistent state supreme court finding. The authors argue that the unstated reasoning of the Court was less that the state violated its negative duty not to discriminate but its positive duty to prevent racial discrimination in urban housing.

248. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

such as holding religious prayers at public school graduations.<sup>249</sup> Other justices adhere to the permission/coercion dichotomy and consider only the latter proscribed.<sup>250</sup>

Although the specific issue of the constitutionality of laws "encouraging" private racial discrimination has not been addressed since *Reitman*, the Court's general post-*Reitman* Equal Protection Clause jurisprudence has clarified, and perhaps even resolved, the issue as a matter of doctrine. The California constitutional amendment at issue in *Reitman* was on its face racially neutral,<sup>251</sup> so that it would now be subject only to rational basis scrutiny<sup>252</sup> unless the plaintiff, Mulkey, could prove that its disproportionate impact on racial minorities was intentional.<sup>253</sup> As is well-known, the Court has provided several guidelines for discharging this burden of proof so that (a) discriminatory intent need only be a motivating factor, not the sole, or even primary, one;<sup>254</sup> (b) even if the plaintiff meets this burden, strict scrutiny will still not apply if the defendant can show the law would have been enacted even without the discriminatory motive;<sup>255</sup> and (c) the law must have been enacted not merely "in spite of" but "because of" its discriminatory effect.<sup>256</sup> As a matter of doctrine, this test would

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249. Justice O'Connor is the most prominent proponent of the endorsement test. Her test is whether a reasonable observer would view the challenged act as an official endorsement of a religion or religion in general. See *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring).

250. Thus, for example, Justices Kennedy and Scalia both adhered to the "coercion" standard in *Lee v. Weisman*, 505 U.S. 577 (1992), although they disagreed on whether that standard had been violated on the facts of the case.

251. See *supra* note 112 (quoting the language of the text of the amendment).

252. My as-applied argument would not be relevant here, as an enforcing court would not inherently be required to consider the race of the person to whom the landlord refused to rent. Note that on the basis of *Romer v. Evans*, 517 U.S. 620 (1996), the state constitutional amendment at issue in *Reitman* might be struck down even under rational basis scrutiny. In *Romer*, the Court purported to apply the rational basis test to invalidate under equal protection a Colorado constitutional amendment repealing all laws protecting gays from discrimination and preventing their subsequent reenactment.

253. In *Reitman*, the Court did not discuss the law within the race-specific/race-neutral paradigm established two years later in *Washington v. Davis*, but disagreed whether the amendment could be said to amount to prohibited state encouragement of private racial discrimination. In his dissent, Justice Harlan stated the test he applied as follows: "A state enactment, particularly one that is simply permissive of private decision-making rather than coercive... should not be struck down... under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect." *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967) (Harlan, J., dissenting) (emphasis added). As so stated, this test is easier to satisfy than the one in *Davis* because it makes proof of discriminatory effect sufficient to invalidate, although there did appear to be strong evidence of such an effect in *Reitman*. In fact, Harlan appeared to require more-active involvement of the state in specific acts of discrimination for the involvement to amount to encouragement.

254. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

255. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

256. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

likely replace the Court's search for active state "encouragement" of private racial discrimination, although it is less clear which way this would cut in terms of outcome. On the other hand, had the constitutional amendment in *Reitman* explicitly, rather than only tacitly, permitted private racial discrimination in housing, the Court's actual analysis would probably have remained unchanged, since it ignored the fig leaf of neutral language and focused squarely and candidly on the question that lay underneath: May a state endorse or encourage private racial discrimination? Today, the race-conscious version would immediately trigger strict scrutiny.

A second key topic under equal protection analysis is private sex discrimination, which once again illustrates the basic thesis of this Article that the constitutional duties imposed exclusively on government may have substantial impact on private actors in all the ways previously discussed. First, there can be no doubt that traditional common law rules (no less than statutes) discriminating on the basis of sex are both directly subject to the Constitution and presumptively violate it.<sup>257</sup> Second, this is so where discriminatory state laws are relied on in private litigation as well as public.<sup>258</sup> Thus, many of the Court's pioneering cases in the field resulted in its striking down state laws at issue in the most private of litigation possible, that between family members. Important examples include *Reed v. Reed*,<sup>259</sup> *Orr v. Orr*,<sup>260</sup> and *Stanton v. Stanton*.<sup>261</sup> Third, the types of laws invalidated as unconstitutional sex discrimination include both private laws, such as laws concerning the disposition of property,<sup>262</sup> and public laws, such as laws setting the levels of social security benefits from the state.<sup>263</sup> Fourth, laws concerning, regulating, or permitting sex discrimination by private actors are subject to the Constitution, and by the very same

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257. Thus, for example, the traditional common law rule giving a husband absolute control of his wife's property would undoubtedly be unconstitutional if still in existence. See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), in which the Supreme Court invalidated a statutory version of this traditional rule.

258. As we have seen, only statutes, but not common law, at issue in private litigation are directly subject to the Charter in Canada.

259. 404 U.S. 71 (1971) (striking down a state law giving men preference as administrators of estates).

260. 440 U.S. 268 (1979) (striking down a state law authorizing alimony awards to wives but not husbands).

261. 421 U.S. 7 (1975) (striking down a statute providing that females reached majority at eighteen and males at twenty-one). *Craig v. Boren*, 429 U.S. 190 (1976), is an example of public litigation in the area of sex discrimination — here an individual sued the state.

262. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating a Louisiana law giving every husband as "head and master of the household" unilateral power to dispose of property jointly owned with his wife).

263. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating a provision of the Social Security Act awarding federal survivor's benefits to widows, but not widowers, responsible for dependent children).

tests, as those constituting or expressing discrimination by the government itself.

As with racial discrimination, the Court's current doctrine distinguishes between facially gender-conscious laws, subject to intermediate scrutiny, and gender-blind laws with disparate impact on women, subject to rational basis review unless the plaintiff can prove discriminatory intent. Accordingly, heightened scrutiny attaches to any law either requiring or expressly permitting sex discrimination, whether by government or private actors. By contrast, laws impliedly permitting private sex discrimination will, assuming they are otherwise written in gender-neutral language, be subject to rational basis absent proof of discriminatory intent. Thus, for example, the California constitutional amendment at issue in *Reitman* equally permitted property owners to refuse to sell or rent to women.<sup>264</sup> A woman suing the owner in place of Reginald Mulkey would now have to prove the amendment was enacted "because of" and not merely "in spite of" this consequence, as Brenda Feeney failed to do in challenging the veterans' preference law that cost her the promotion she had so clearly earned on the merits.<sup>265</sup>

Turning to comparative materials, in contrast to the United States, sex rather than race discrimination has been the central issue in the evolution of constitutional equality in both Canada and Germany. Under Section 15, the general equality provision of the Canadian Charter,<sup>266</sup> the Canadian Supreme Court has clearly adopted the position that where a law is discriminatory either on its face or in its effect, it is unconstitutional unless justified under Section 1 analysis;<sup>267</sup> there is no requirement of discriminatory intent. Section 15 is thus understood to prohibit not only "direct discrimination," but what is known as "indirect" or "systemic discrimination." As Peter Hogg explains:

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264. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

265. *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979).

266. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1), (2):

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Id.*

267. For the text of the test of justification under Section 1 of the Charter, see *supra* note 224.

Systemic discrimination is caused by a law that does not expressly employ any of the categories prohibited by s.15, if the law nevertheless has a disproportionately adverse effect on persons defined by any of the prohibited categories. In other words, a law that is neutral (non-discriminatory) on its face may operate in a discriminatory fashion; if it does, the discrimination is systemic. . . . The mere fact that the law has the effect of discriminating against persons defined by a prohibited category is enough to establish the breach of s.15.<sup>268</sup>

As a result of this interpretation, Section 15 has a substantively greater impact on private actors than does the Equal Protection Clause in the United States, tempered structurally by the lesser impact of Section 15 on common law rules at issue in private litigation under weak indirect horizontal effect.

In Germany, by contrast, such “systemic” discrimination has not been subject to that country’s version of strict scrutiny which, as in the United States, has been reserved for laws expressly discriminating on one of the “suspect” categories contained in Article 3(3) of the Basic Law.<sup>269</sup> Once again, however, the existence in the Basic Law of positive governmental duties in the area of sex equality is (at least potentially) an alternative structural mechanism that results in constitutional norms having substantial impact on private actors.<sup>270</sup>

### *C. How the Impact of the Equal Protection Clause on Private Actors Might Be Substantially Increased*

The analysis in the previous Section illustrated one of the major points of this Article: the actual impact of specific constitutional norms on private actors is a function of *both* the governing structural position on scope — which of the positions on the vertical-horizontal spectrum is adopted — and the substantive content and interpretation of particular individual rights. In the United States, it is mistaken, for example, to believe that private employers may not in principle be adversely affected by the constitutional free speech rights of their employees, and the actual impact is a function of the substantive weight and scope accorded to this right. Likewise, given the

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268. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 1270-71 (4th ed. 1997).

269. GG Art. 3 Nr. 3 (“No one may be prejudiced or favored because of his sex, parentage, race, language, homeland and origin, faith, religious or political opinions. Persons may not be discriminated against because of their disability.”).

270. Article 3(2) of the Basic Law, as amended in 1994, reads as follows: “Men and women shall have equal rights. The state shall seek to ensure equal treatment of men and women and to remove existing disadvantages between them.” Thus far, resulting measures — including affirmative action programs — have been limited to public-sector employment. In Canada, Section 15(2) of the Charter permits, but does not require, laws or programs having as their object “the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race . . . [or] sex . . .” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(2).

application of the Constitution to all law relied on in private litigation under the threshold principle, it is only because of the Court's substantive interpretation of the Equal Protection Clause in *Washington v. Davis* that the Clause does not have greater regulatory impact on private actors by rendering more of the laws they may seek to rely on unconstitutional. Were that interpretation to change and that of the Canadian Supreme Court adopted,<sup>271</sup> there would be many more actions that private actors could not be permitted to take, and interests that could not be protected, under color of state law.<sup>272</sup>

A number of the leading state action cases considered above were decided prior to the landmark case of *Washington v. Davis* in 1976. *Davis*, of course, made the distinction between facially race-conscious and race-neutral laws critical in terms of constitutional scrutiny under the Equal Protection Clause: the former automatically trigger strict scrutiny while the latter only rational basis unless the plaintiff can prove discriminatory intent on the part of the lawmaker. Prior to *Davis*, this distinction was not so obviously essential, or even relevant, and a number of facially neutral laws disproportionately burdening racial minorities were invalidated because of their effects without any search for the type of discriminatory intent now required.

Thus, in *Reitman*, the majority held that the facially neutral Proposition 14 unconstitutionally encouraged private discrimination. The Court arrived at this conclusion without engaging in the type of search for specific discriminatory motive that it would now.<sup>273</sup> Similarly, in *Moose Lodge No. 107 v. Irvis*,<sup>274</sup> decided four years before *Davis*, although the majority rejected most of the plaintiff's claims on the traditional threshold ground of state action, it did reach the merits and ruled in the plaintiff's favor regarding the state liquor licensing board's regulation requiring every licensed club to adhere to its constitution and by-laws. The effect of applying this facially neutral rule, according to the majority, was unconstitutionally "to invoke the sanctions of the State to enforce a concededly discriminatory private rule,"<sup>275</sup> even though this undoubtedly was not its intent. Indeed, in citing *Shelley* as authority for this proposition,<sup>276</sup> the Court perhaps

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271. See *supra* notes 266-267 and accompanying text.

272. The same greater impact on private actors would occur if the Court were to accept the doctrine of "substantive equal protection" associated with Ken Karst. See Karst & Horowitz, *supra* note 10 (arguing that the Court has implicitly acknowledged that the Equal Protection Clause imposes affirmative duty on the state to prevent private racial discrimination in areas such as voting and urban housing).

273. Even Harlan's dissent stated the applicable test to require "persuasive evidence of an invidious purpose or effect." *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967) (Harlan, J., dissenting) (emphasis added).

274. 407 U.S. 163 (1972).

275. *Moose Lodge*, 407 U.S. at 179.

276. *Id.*

suggested that the common law rule in that case might still have been unconstitutional even if it had not been deemed race-conscious on its face, for its racially disproportionate impact was obvious. Post-*Davis*, it is less clear that these two facially neutral laws would be held unconstitutional: the one in *Moose Lodge* would almost certainly not be; the one in *Reitman* would depend on the available evidence of intent.

Accordingly, if (as many have argued) *Davis*'s strong presumption of constitutionality for facially neutral laws with discriminatory effects were to be replaced by a rule that such laws are constitutionally suspect, at least, say, where the disproportionate burden is entirely foreseeable or imposed because of "racially selective indifference,"<sup>277</sup> the indirect effect of constitutional norms on private actors would be dramatically increased. Thus, not only might the plaintiffs in *Davis* have successfully sued the Washington D.C. police department, but a range of neutral permissive laws relied on by private actors whose conduct predictably creates discriminatory effects could also be challenged. Indeed, the private discrimination becomes the disproportionate effects that the state is constitutionally responsible for.

At the end of his opinion for the Court in *Davis*, Justice White wrote that acceptance of the disparate impact rule would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."<sup>278</sup> In conspicuously limiting the implications of the disparate impact rule to such *public* statutes, Justice White seriously understated his own case, for if the Equal Protection Clause were reinterpreted to incorporate this rule, it would apply fully and directly to *all* facially neutral laws, public and private, statutory and common law. It would thereby, of course, very substantially increase the impact of this constitutional right on private actors.<sup>279</sup>

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277. This concept, and the related one of "unconscious racism," is associated with Paul Brest and Charles Lawrence. The idea is that certain governmental decisions may be race-dependent, in the sense that they would have been different but for the race of those disadvantaged by them. See Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7-8 (1976); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

278. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

279. Whether acknowledgment of this point would likely, or should, either decrease or increase resistance to overturning the rule in *Davis* are interesting and important questions beyond the scope of this Article.



## CONCLUSION

This Article has argued that although private actors are not bound by individual constitutional rights in the United States, they are indirectly subject to (and may be adversely affected by) them because such rights govern the laws that private actors invoke and rely on against each other. As a result, constitutional rights may either prevent such laws from protecting certain interests, choices, and actions of one private actor against another altogether, or place significant limits on their ability to do so. For example, the First Amendment prevents the economic interests of employers from being legally protected against picketing by its employees, and of shopkeepers from being legally protected against politically inspired boycotts. The Equal Protection Clause imposes constitutional limits on the ability of private actors to gain legal protection for their choices to engage in race or sex discrimination. For this reason, it is not true that private choices and conduct are categorically outside the reach of constitutional rights provisions.

The extent of this reach of individual rights into the private sphere defies the standard understanding of the United States as creating a rigid public-private distinction in constitutional law, thereby epitomizing the vertical approach to this issue. It also distinguishes the United States from countries such as Canada, where constitutional rights do not always directly govern such private laws. In fact, only in those few countries, such as Ireland, where individual rights directly bind private actors do they reach further into the private sphere as a matter of general constitutional structure than in the United States.

In making this argument, the Article has attempted to clarify and simplify what is widely understood to be a perplexing and complex area of constitutional law. Since all law is subject to the Constitution, the only issue in each case in which a law is challenged as unconstitutional is the substantive one of whether that law violates the Constitution. There is no separate, threshold issue of whether the state has been sufficiently implicated in private action to trigger constitutional review where a private actor relies on one of the state's laws. These laws are not subject to the Constitution because they do or do not embody the requisite amount of "state action" under the Fourteenth Amendment, but because the Supremacy Clause makes them so. Accordingly, the threshold question in a case such as *Shelley* is no more complicated than that in *New York Times*: Is one private party to a lawsuit relying on a provision of state law that the other private party challenges as unconstitutional? This simple, factual issue must be distinguished from the only genuine issue of constitutional law in such a case, the substantive question of whether the challenged law violates the Constitution. Private choices are always indirectly subject to the Constitution whenever an individual relies on the law to protect

or enforce them, because the Constitution applies directly to that law. Disputes over the proper interpretation of particular constitutional rights and duties, which will determine whether such laws survive constitutional scrutiny, must be heard and resolved rather than avoided by transposing them onto a false threshold issue, as in *Flagg Brothers*.

This Article also recasts the debate about individual autonomy and the state action doctrine. Rejecting the traditional vertical position as an incomplete and inaccurate understanding of the reach of constitutional rights into the private sphere means that autonomy is not a one-way street in favor of the private instigator of action, automatically permitting her to do what it would be unconstitutional for the government to do. The autonomy interests of the private individual harmed or acted upon are taken into account under strong indirect horizontal effect, albeit not as fully as under direct horizontal effect. This autonomy interest is expressed by not permitting a private actor to invoke or rely on an unconstitutional law in defense of their action, as for example in *Reitman* and *Shelley*.

Finally, the actual impact of constitutional rights on private actors is not fixed but will vary with changes in their substantive interpretation. Thus, as discussed, many more laws relied on by private actors against each other would violate free speech and free exercise rights under an “incidental-burden” rule than under the current one, and would violate equal protection under a disparate impact rule. The extent to which each of these particular individual rights impacts the private sphere in practice is thus a matter of constitutional interpretation, and this overlooked dimension of the interpretive task may legitimately be added to the other factors employed. No doubt doing so will only add to the disagreements that already exist. What should no longer be subject to general constitutional consensus, however, is the position that the reach of constitutional rights into the private sphere is definitively resolved and fixed by the state action doctrine.